Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 9 February 2023 [1]

Case C-15/22

RF
v
Finanzamt G

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling – European Development Fund (EDF) – Income tax – Exemption granted to salaries in relation to projects related to development aid financed by national budgetary resources – Different treatment of salary earned in relation to a project funded by the EDF – Article 63 TFEU – Free movement of capital – Article 4(4) TFEU – Exercise of parallel competences – Articles 208 and 210 TFEU – Development cooperation – Obligation to promote the policies on development cooperation – Principle of sincere cooperation – Facilitation of the EU's tasks – Attainment of the EU's objectives – Direct effect)

1. For the purposes of personal income tax, can Member States treat the salary of persons working on development cooperation projects that are carried out in third countries [2] and financed by the European Development Fund ('the EDF') differently from a salary earned through work on similar projects that are, by contrast, funded by national budgetary resources?

2. The present case concerns a German national administrative practice ('the national tax rule at issue'). It grants an exemption from income tax for salaries paid for working on foreign development aid projects that are funded to a level of at least 75% by a Federal Ministry responsible for development cooperation or by a state-owned private development assistance company [3] (together, 'national budgetary resources'). However, the salary of an employee working on an aid project that is funded by the EDF does not benefit from such an exemption.

3. The referring court asks the Court of Justice, in essence, whether the principle of sincere cooperation laid down in Article 4(3) TEU, read in conjunction with Articles 208 and 210 TFEU concerning the field of development cooperation, should be interpreted as precluding Member States from taxing salaries earned in relation to aid projects financed by the EDF, where such an exemption is granted for a salary earned in relation to a project financed by national budgetary

1 Original language: English.

2 Cooperation can take many forms, but 'development cooperation' is usually understood as being synonymous with official development assistance.

3 Gesellschaft für internationale Zusammenarbeit (GIZ) GmbH.

resources. In addition, the difference in treatment resulting from that tax rule also raises the question whether the Treaty provisions on the fundamental freedoms are to be applied to the case at hand.

4. It follows that the Court is faced with the delicate task of determining whether the fundamental freedoms and/or the principle of sincere cooperation laid out in Article 4(3) TEU apply in the area of development cooperation and, if so, how. This is by no means a simple question since the European Union and Member States may exercise parallel competences in that area.[4] The present case also touches upon a broader global debate that relates to the tax treatment of development assistance and its effectiveness.[5]

I. Legal context

A. International law

1. The Lomé IV Convention

5. The Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 was concluded between the African, Caribbean and Pacific Group of States ('the ACP States') and the European Economic Community (EEC) ('the Lomé IV Convention').[6] That convention was approved by a Decision of the Council and the Commission of 25 February 1991.[7]

6. Article 2 of the Lomé IV Convention states that ACP-EEC cooperation, 'underpinned by a legally binding system and the existence of joint institutions', is to be exercised on the basis of the principles of equality between partners, respect for their sovereignty, mutual interest and interdependence, and the right of each State to determine its own political, social, cultural and economic policy options.

7. Article 9 of that convention sets out:

'In order to step up the effectiveness of the instruments of this Convention, the Contracting Parties shall adopt, in the framework of their respective responsibilities, guidelines, priorities and measures conducive to attaining the objectives set out in this Convention …'

4 Under Article 4(4) TFEU, in the areas of development cooperation and humanitarian aid, the European Union is to have competence to carry out activities and conduct a common policy; however, the exercise of that competence is not to result in Member States being prevented from exercising theirs.

5 See, for example, more recently, the Tax Treatment of Official Development Assistance Hub launched in January 2022 by the Organisation for Economic Co-operation and Development (OECD) (https://www.oecd.org/tax/tax-treatment-official-development-assistance/). See also the Paris Declaration on Aid Effectiveness adopted in 2005 and reaffirmed in Accra in 2008 at ministerial-level forums convened by the OECD (available at https://www.oecd.org/development/effectiveness/34428351.pdf).

6 OJ 1991 L 229, p. 3.

7 91/400/ECSC, EEC, OJ 1991 L 229, p. 1.

2. The Cotonou Agreement

8. The Partnership Agreement between the [ACP States], of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 ('the Cotonou Agreement')[8] by Council Decision 2003/159/EC of 19 December 2002.[9] It came into force on 1 April 2003 and replaced the existing Lomé Conventions.

9. Article 2 of the Cotonou Agreement sets out the fundamental principles of ACP-EC cooperation, which is 'underpinned by a legally binding system and the existence of joint institutions'.

10. Article 3 of the Cotonou Agreement states that 'the Parties shall … take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and to facilitate the attainment of the objectives thereof. …'

11. Article 70(a) of the Cotonou Agreement states that cooperation is to support 'micro projects at local level which have an economic and social impact on the life of the people, meet a demonstrated and observed priority need, and shall be undertaken at the initiative and with the active participation of the local community which shall benefit therefrom'.

12. Article 71 of that agreement provides:

'1. Microprojects and decentralised cooperation operations may be supported from the financial resources of the Agreement. …

2. Contributions for the financing of micro-projects and decentralised cooperation shall be made by the Fund, in which case the contribution shall not normally exceed three-quarters of the total cost of each project and may not exceed the limit set in the indicative programme. The remaining balance shall be provided:

(a) by the local community concerned in case of micro-projects (either in kind or in the form of services or cash and adapted to its capacity to contribute);

…

(c) exceptionally by the ACP State concerned, either in the form of a financial contribution or through the use of public equipment or the supply of services.

…'

B. European Union law

13. The EDFs were set up to finance cooperation with the ACP States and overseas countries and territories, initially by means of an annex to the EEC Treaty and later by internal agreements between the Member States meeting within the Council. An EDF finances any project or programme which contributes to the economic, social or cultural development of the countries in question. Each EDF is concluded for a period of several years, often five years, corresponding to

8 OJ 2000 L 317, p. 3.

9 OJ 2003 L 65, p. 27.

the period of validity of the various agreements and conventions through which the European Union and its Member States established the special partnership with the ACP States. Historically, the EDFs did not come under the general budget of the European Union. Therefore, specific financial regulations were adopted to implement the obligations stemming from the international agreements and to set up, in particular, the financing of the EDF. [10]

1. The Seventh EDF [11]

14. The representatives of the Governments of the Member States of the European Economic Community, meeting within the Council, on 16 July 1990 adopted Internal Agreement 91/401/EEC on the financing and administration of Community aid under the [Lomé IV Convention]. [12] By that agreement, the Member States established the Seventh EDF. The provisions implementing that internal agreement are the subject of Financial Regulation 91/491/EEC of 29 July 1991 applicable to development finance cooperation under the [Lomé IV Convention]. [13]

15. The Authorising Officer decided to bring an end to the Seventh EDF on 31 August 2008. In the absence of a legal basis for the closure of EDFs, the remaining balances and the related contracts and decisions were transferred to the Ninth EDF, according to the provisions of Part 3 of the Financial Regulation applicable to the Ninth EDF. [14]

2. The Ninth EDF

16. After the Cotonou Agreement, the Internal Agreement 2000/770/EC between Representatives of the Governments of the Member States, meeting within the Council, on the Financing and Administration of Community Aid under the Financial Protocol to [the Cotonou Agreement] and the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the EC Treaty was adopted. [15] The provisions implementing that internal agreement are the subject of the Financial Regulation of 27 March 2003.

C. German Law

17. Paragraph 1(1), first sentence, of the Einkommensteuergesetz (Law on income tax; 'the EStG'), in the version applicable to the facts in the main proceedings, provides that natural persons domiciled or who have their place of permanent residence or usual abode in Germany are subject in that country to tax on the entirety of their income.

18. Under Paragraph 2(1) of the EStG, income from paid employment which the taxable person receives while subject to unlimited tax liability is subject to income tax.

10 As from 2021, the EDF programmes were included in the EU multi-annual financial framework and, thus, are subject to the EU financial regulations in the same way as other EU funding programmes. See https://ec.europa.eu/info/publications/eu-and-edf-annual-accounts_en.

11 The order for reference refers to the Seventh and Ninth EDFs. It is for the national court to ascertain whether both of them are applicable in the present case.

12 OJ 1991 L 229, p. 288.

13 OJ 1991 L 266, p. 1.

14 See Final accounts for the financial year 2008 of the Seventh, Eighth, Ninth and Tenth EDFs (OJ 2009 C 274, p. 1).

15 OJ 2000 L 317, p. 355.

19. Paragraph 34(c) of the EStG provides:

'(1) Where persons subject to unlimited tax liability pay tax on income of foreign origin in the State of origin of that income which is equivalent to German income tax, the foreign tax which has been calculated, paid and reduced by the amount of a right of reduction shall be offset against the amount of German income tax which they are liable to pay in respect of income received in that State;…

…

(5) The upper tax authorities of the *Länder* or the tax authorities designated by them may, with the agreement of the Federal Ministry of Finance, grant a partial or full rebate of the income tax on foreign income, or fix a lump sum where this is deemed appropriate for economic reasons or if the application of point 1 of this paragraph proves particularly difficult.'

20. On 31 October 1983, the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) published a Notice concerning the tax treatment of employee income for overseas work [16] ('the Notice from the Ministry of Finance'), which is addressed to the upper tax authorities of the *Länder*. It provides, in Section I(4), that, inter alia, activities carried out abroad for a national contractor in connection with German official development assistance within the framework of technical or financial cooperation are to be exempt from income tax.

21. According to the order for reference, the German tax authorities interpreted the phrase 'German official development assistance' as referring only to development assistance measures that are funded directly from the German budget, either by the Federal Ministry responsible for development cooperation or by the GIZ.

II. The dispute in the main proceedings and the question referred for a preliminary ruling

22. In the period from 12 April 2009 to 31 October 2012, RF worked as a project manager for a development aid company established in Germany. She worked on the Micro-Projects Programme (MPP) ('the programme at issue') in Africa on a fixed-term contract of employment. [17] The programme was financed, in whole or in part, by the resources of the European Union and its Member States, namely under the Seventh and Ninth EDFs. [18]

23. During that period, RF's place of residence and centre of interests were in Germany, where she was therefore subject to unlimited tax liability, while her place of employment was in Africa.

24. Since the development aid company considered that RF's salary was exempt under the Notice from the Ministry of Finance, it did not withhold tax at source on that salary for the 2011 and 2012 financial years and did not pay that tax to the competent tax authorities. According to the file submitted to the Court, that company was initially issued with an exemption certificate, which was made conditional on compliance with the Notice from the Ministry of Finance. RF's salary was also not taxed in Africa at the place of employment.

16 BStBl. 1983 I, p. 470.

17 The order for reference does not contain any details as to the country concerned, but RF mentions that it was Nigeria (see point 6 of the written observations).

18 As already mentioned, it is for the national court to ascertain whether the work carried out by RF was in relation to both the Seventh and Ninth EDFs.

25. The development aid company was subjected to a payroll tax audit by the competent tax authorities. Those authorities stated that the programme had not been financed by the Federal Ministry responsible for development cooperation or by the GIZ, but by the EDF. Therefore, by tax notices of 13 February 2014, those authorities decided that RF's salary should be subject to income tax in respect of 2011 and 2012.

26. RF lodged a complaint against that decision before those authorities, which rejected it. She then brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), which was unsuccessful. It is against that judgment that RF directs her appeal on a point of law to the Bundesfinanzhof (Federal Finance Court, Germany) ('the referring court').

27. In the order for reference, the referring court states that, on the basis of national law, the appeal is unfounded, since RF's salary was not directly financed by any national budgetary resources and her activity abroad was therefore not linked to German public development aid. It considers that the distinction made by the administration is also not contrary to the principle of equal treatment since the tax benefit at issue is motivated by support for certain sectors of the German economy and, therefore, constitutionally justified.

28. Nevertheless, the referring court harbours doubts as to the compatibility of the legislation at issue with EU law. It points out that, unlike in the *Petersen* case,[19] the tax rule at issue does not constitute a restriction on free movement, and, in particular, on the free movement of workers, since no worker or employer is discriminated against on the ground that he or she comes from another Member State.

29. According to the referring court, the tax rule at issue could be contrary to the principle of sincere cooperation enshrined in Article 4(3) TEU. RF claims, in that regard, that it follows from that principle and from the obligation of the Member States to coordinate their development policies that there is a duty to include projects financed from EU resources within the scope of the tax exemption at issue. However, the referring court is of the opinion that, in the light of the Member States' own competence in the field of development aid, it is not certain whether they may be prohibited from adopting development aid policy measures designed to promote their foreign trade. Such a duty does not derive either from the Cotonou Agreement.

30. In those circumstances, the referring court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are Article 4(3) of the [TEU] and Article 208 [TFEU], in conjunction with Article 210 [TFEU], to be interpreted as precluding a national administrative practice according to which tax is not waived in cases where a development cooperation project is financed by the [EDF], while salary that a worker earns from a current employment relationship in respect of an activity associated with German official development assistance within the framework of technical or financial cooperation that is financed to [a level of] at least 75% by a Federal Ministry responsible for development cooperation or else by a state-owned private development assistance association is, in certain conditions, exempted from taxation?'

31. Written observations were submitted by RF, the German Government and the European Commission. Those parties also presented oral argument at the hearing on 23 November 2022.

[19] Judgment of 28 February 2013, *Petersen* (C-544/11, EU:C:2013:124).

III. Assessment

A. Preliminary remarks

32. First, the German Government, without formally raising an objection to the question referred, nevertheless expresses doubts as to its admissibility. In its written observations and at the hearing it claimed, in essence, that the exemption provided for by the national tax rule at issue necessarily requires that the project be financed to a level of at least 75% by national budgetary resources. In other words, in order for the tax rule to be applicable, the salary that an employee receives must result from an activity that receives at least 75% of its financing from those resources. However, this does not mean that such an activity is entirely exempt from tax, since the proportion of the activity that is not financed by those resources will still be subject to taxation (that is to say, up to a maximum of 25%).

33. In that regard, I would point out that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. [20]

34. In my view, while there may be gaps in the legal background set out in the order for reference, it is clear how the national tax rule at issue operates. In essence, the national court has explained that that rule provides that a salary received in respect of an activity in the field of development assistance is exempt from income tax, provided that the activity is financed using funds from national budgetary resources, while a salary gained in respect of such an activity financed using EDF funds is subject to taxation. Consequently, I am of the opinion that the Court may provide the referring court with elements of interpretation of EU law in the context of the assessment of the tax rule at issue.

35. Second, by its question, the referring court asks, in essence, whether Article 4(3) TEU, read in conjunction with Articles 208 and 210 TFEU, precludes the national tax rule at issue. However, the Commission suggested in its written submissions that an explicit reference to the fundamental freedoms laid down in the Treaties be included in the wording of the question. Therefore, by its written questions, the Court requested that the parties provide an answer at the oral hearing in respect of the fundamental freedoms. At the hearing, RF and the Commission both submitted that the tax rule at issue fell within the scope of the fundamental freedoms, while the German Government contended that those freedoms did not apply in the present case.

36. I would recall that the Court may have to reformulate the question referred to it. The Court may also find it necessary to consider provisions of EU law, which the national court has not referred to in its questions. [21]

[20] See, inter alia, judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 36 and the case-law cited).

[21] Judgments of 13 October 2016, *M. and S.* (C-303/15, EU:C:2016:771, paragraph 16 and the case-law cited), and of 31 May 2018, *Zheng* (C-190/17, EU:C:2018:357, paragraph 27).

37. In that respect, first, it should be observed that, in its order for reference, while making mention of the freedom of movement enshrined in Article 45 TFEU and the provisions of the Cotonou Agreement, the national court comes to the conclusion that those provisions do not preclude the national rule at issue, since RF is not a worker from another Member State. [22]

38. It is important to note that the request for a preliminary ruling in *Petersen* [23] concerned the same national tax rule set out in the Notice from the Ministry of Finance, as the one subject of the present case. However, the Court examined a different aspect of that rule, namely the place of establishment of the employer. In *Petersen*, the worker at issue was employed by an employer established in Demark that carried out a development aid project financed by the Danish Agency for International Development. The Court observed that the exemption from income tax required that the employer have its registered office in Germany and held that such a requirement constituted a restriction on the free movement of workers prohibited under Article 45 TFEU. [24] In the present case, the facts in the main proceedings do not concern that same requirement (which is actually met), since both RF and the development aid company are established in Germany. In any event, it is a purely internal situation with respect to the free movement of workers.

39. Nonetheless, I would emphasise that the national tax rule at issue also treats employees differently on the basis of the *origin of the funds* provided for the aid project. The tax exemption is granted or refused to the employee working on that project depending on whether a development cooperation project is financed directly by national budgetary resources or by EDF resources. Thus, it is appropriate to commence by determining whether and, if so, which of the other fundamental freedoms may apply to the present case.

B. The relevance of the other fundamental freedoms

40. In order to determine whether a national measure falls within the scope of a fundamental freedom, it is clear from now well-established case-law that the *purpose* of the legislation concerned must be taken into consideration. [25]

41. For the reasons mentioned above, [26] I take the view that the case in the main proceedings cannot be examined in the light of Article 45 TFEU. However, the fact that this case deals with the effect of the national tax rule at issue on cross-border workers, but not with the way in which it affects the financing of aid projects, does not rule out the application of the other fundamental freedoms, unless those other fundamental freedoms are considered to be ancillary in relation to the free movement of workers. [27] In certain specific situations where two fundamental freedoms are equally important for the purposes of the legislation at issue, the Court has held that those

22 Preliminary reference, paragraphs 29 and 30. However, I should emphasise that, while being a German resident, RF carried out her tasks in the third country in question under the aid programme at issue.

23 Judgment of 28 February 2013, C-544/11, EU:C:2013:124.

24 Ibid., paragraphs 39 to 43.

25 See, in particular, judgments of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 26); of 13 November 2012; *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 90); and of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 31).

26 See point 38 above.

27 The Court has held that where a national measure relates to two fundamental freedoms at the same time, it is necessary, in principle, to examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case in the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, judgments of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, paragraph 26 and the case-law cited, and of 17 September 2009, *Glaxo Wellcome*, C-182/08, EU:C:2009:559, paragraph 37).

situations relate to both fundamental freedoms at the same time.[28] According to the relevant case-law, such a specific situation may arise where one of the fundamental freedoms does not apply to the case at hand, since the situation is, for the purposes of that freedom, confined in *all respects* within a single Member State.[29] However, that may not be the case for the purposes of the other fundamental freedoms. It follows that the situation in question may be confined with respect to the free movement of workers within a single Member State but have a cross-border element in respect of other freedoms.

42. In the present case, I would observe that a tax rule such as that at issue in the main proceedings has the effect of creating a difference in treatment depending on the *origin of the funds*. As is clear from the order for reference, the tax exemption at issue is granted with respect to a foreign assistance development activity funded by national budgetary resources, but is refused when the financing is granted by the EDF. In that respect, in its recent Grand Chamber judgment in *Commission* v *Hungary*,[30] the Court held that national legislation that treats differently the associations and foundations established in Hungary according to the national or 'foreign' origin of the financial support they receive falls under Article 63 TFEU.[31] Therefore, in the present case, since the difference in treatment at issue lies in the origins of the funds, it should be examined whether and, if so, to what extent a national tax rule such as that at issue in the main proceedings is capable of affecting the exercise of the free movement of capital enshrined in Article 63 TFEU. In that respect, I should emphasise that, as regards Article 63 TFEU, it follows from the Court's settled case-law that that article has *direct effect*, so that it may be relied on before national courts and may render national rules that are inconsistent with it inapplicable.[32]

43. Taking into account such direct effect and in the light of the oral arguments put forward by RF and the Commission, I shall start by examining whether Article 63 TFEU must be interpreted as precluding the application of a tax rule of a Member State which provides for an exemption from income tax for the salary received by an employee assigned to development aid activities only where such an activity is financed to a level of at least 75% from national budgetary resources, but has the effect of depriving an employee of the benefit of such an exemption where he or she is assigned to an activity of that nature financed to the same extent by one of the EDFs.

28 See, for instance, judgment of 11 June 2009, *X and Passenheim-van Schoot* (C-155/08 and C-157/08, EU:C:2009:368, paragraph 40). There may be an overlap between the freedom of establishment and the free movement of capital, specifically in the case of shareholdings and dividends (see, to that effect, judgment of 24 May 2007, *Holböck*, C-157/05, EU:C:2007:297, paragraphs 23 and 24).

29 See, to that effect, judgments of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 33 and the case-law cited), and of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited).

30 Judgment of 18 June 2020, *Commission* v *Hungary (Transparency of association)* (C-78/18, EU:C:2020:476).

31 Ibid, paragraphs 61, 62 and 65.

32 See, to that effect, judgment of 14 September 2017, *The Trustees of the BT Pension Scheme* (C-628/15, EU:C:2017:687, paragraph 49).

C. The free movement of capital enshrined in Article 63 TFEU

1. The scope of Article 63 TFEU

(a) Territorial scope

44. First of all, Article 63 TFEU provides that all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited. The referring court states that the differentiated tax treatment at issue is not discriminatory within the meaning of the Treaties since the foreign assistance development activity funded directly from EU resources does not constitute funding from another Member State. [33]

45. In that respect, I would observe that, in the present case, the funding provided to the development aid company in order to carry out foreign assistance development activities is provided by the EDFs. As explained in points 13 and 16 above, the financing of the EDFs was adopted by internal agreement between the representatives of the governments of the Member States, meeting within the Council, and is subject to financial regulations. Therefore, while the funding to the undertaking at issue is not provided directly by another Member State, the expenditure necessary for the (then) Community financial assistance was assumed directly by the Member States, [34] which provided financial contributions to the EDFs. For example, the final accounts of the Ninth EDF for the financial year 2009 show that the EDF resources are 'ad hoc' contributions from the EU Member States. [35] I should add that, according to the financial regulations, the Commission is to 'manage the EDF on its own responsibility' and is to appoint, in particular, the chief authorising officer and the financial controller of the EDF. [36] In short, during the period at issue in the main proceedings, the EDF was intergovernmental in nature and remained outside the EU budget, despite the fact that most of its resources were managed by the European Commission. [37]

46. In my view, the following conclusions can be drawn from that finding. First, if the funding provided to the company at issue were to be provided by German budgetary resources, the situation could be considered as a purely internal situation. However, in the present situation, the funding is provided by external entities, namely the EDF, which has the characteristics referred to above. [38] Second, the funding provided by the EDF is composed of the Member States' direct contributions. It may be equated, therefore, to a movement of capital from *other Member*

33 Paragraph 30 of the preliminary reference.

34 See judgment of 2 March 1994, *Parliament* v *Council* (C-316/91, EU:C:1994:76, paragraph 4). The Court held in that case that the expenditure necessary for the Community's financial assistance was not Community expenditure, but was assumed directly by the Member States and, thus, did not form part of the general budget of the European Communities.

35 See, Final accounts of the 8th, 9th and 10th European Development Funds – Financial year 2009 (OJ 2010 C 310, p. 1). That document adds that, approximately every five years, Member State representatives should meet at intergovernmental level to decide on an overall amount that will be allocated to the Fund and to oversee its implementation. In 2009 and 2008, contributions related to the Ninth EDF were requested from the 15 participating Member States.
Before the Court, the Commission noted that the Seventh EDF (1990-1995) amounted to ECU 10 940 million in contributions from the Member States (including Germany, up to ECU 2 840 million). That means that ECU 8100 (74%) of the funding was provided by other States than Germany. The Commission adds that the Ninth EDF (2000-2007) accounted for up to EUR 13 800 million in contributions from Member States and EUR 1 700 million from the European Investment Bank. Germany's participation in the Ninth EDF is not detailed in the Commission's observations.

36 See Articles 9(1), 11 and 13 of Financial Regulation 91/491, and Articles 1(2), 18 and 27 of the Financial Regulation of 27 March 2003 applicable to the Ninth EDF.

37 Moreover, I would observe that, as regards the MPP which seems to be at issue in the present case, contributions can also be made by the local community concerned and exceptionally by the ACP State concerned (see Article 71(2)(a) and (c) of the Cotonou Agreement).

38 See points 13 to 16 and 45 above.

States. The cross-border element, which makes the Treaty provisions on the free movement of capital applicable, is established by the movement of capital from the EDF to the undertaking at issue.

47. In the light of the foregoing considerations, I take the view that the territorial scope of the free movement of capital laid down in Article 63 TFEU should include the movements of capital between a foreign joint fund established by the Member States, such as the EDF, and an undertaking located in one of the Member States. For the case at hand, this means that there is a cross-border element.

(b) Material scope

48. With regard to the material scope of Article 63 TFEU, while the FEU Treaty does not define the concept of 'movement of capital', the fact remains that the case-law has provided a number of indications of its scope. In the absence of such a definition, the Court has often relied on the list provided by secondary law, namely the nomenclature of capital movements.[39] In the present case, that nomenclature does not explicitly cover the funding provided by the EDF.[40] However, that nomenclature has merely an indicative value for the purposes of defining the notion of capital movements,[41] which means that the Court can expand the concept of capital beyond the 'classical' economic meaning.[42] For example, the Court has already held that inheritances and gifts are included in the concept of movements of capital.[43] Thus, it has already applied the freedom of movement of capital to a tax on a legacy received by a religious association, which was a non-profit-organisation.[44] Moreover, that concept also encompasses investments in real estate relating to the acquisition of a usufruct over land.[45]

49. While the economic and legal meanings of the term 'capital' are not always identical,[46] in the present case, it should by no means be controversial to say that financial funding such as that provided by a fund to a development aid company established in Germany falls within the concept of capital since, subject to the checks to be carried out by the referring court, it involves a transfer of a sum of money to an undertaking for a development project carried out by that company.

50. If the Court decides that the term 'movement of capital' encompasses such financial funding, the next question would be whether it covers the salary paid by that undertaking to a person working on a foreign aid development project. In that respect, the Court must decide whether the 'movement' at issue entails movement between the EDF and the Member State's undertaking or between the EDF and the recipient project developed in the ACP State at issue. In my opinion,

39 Nomenclature set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the [EC] Treaty (an article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5).

40 The Court may consider that it is a financial transaction within the meaning of that nomenclature. For example, in the judgment of 31 January 1984, *Luisi and Carbone* (286/82 and 26/83, EU:C:1984:35), the Court held that movements of capital are financial transactions which consist in essence of the deposit or investment of the sum in question. In principle, therefore, they are financial transactions and are distinct from current payments in that they are more in the nature of the creation of assets.

41 Judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 56 and the case-law cited).

42 Hindelang, S., '*Foreign Direct Investment and the Material Scope of Application of Article 56(1) EC*', The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law, Oxford, 2009; online edition, Oxford Academic, 1 September 2009, pp. 45-47.

43 See, to that effect, judgments of 26 April 2012, *van Putten* (C-578/10 to C-580/10, EU:C:2012:246, paragraph 29), and of 16 July 2015, *Commission* v *France* (C-485/14, not published, EU:C:2015:506, paragraph 22).

44 See judgment of 10 February 2011, *Missionswerk Werner Heukelbach* (C-25/10, EU:C:2011:65, paragraph 23).

45 Judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 57).

46 See footnote 42 above.

the concept of 'movement' should apply to the whole 'aid', that is the financial flow from the donor (the EDF) to the recipient, that is the programme at issue developed in the ACP State in question.[47] The Member State undertaking is just a step in the funding of that programme, which has to meet the needs of the local communities of the ACP States. Therefore, the term 'movement' should cover all the links of the chain from donor to recipient.[48] Since there are international incentives to reduce taxation in respect of the developing countries, it goes without saying that the concept of 'aid' encompasses *the entire financial flow* from the EDF to the recipient in the ACP States.

51. Consequently, I am of the opinion that the tax rule at issue in the main proceedings, in so far as it relates to income funded by the EDF and received by an undertaking in a Member State, should come within the concept of 'movement of capital' within the meaning of Article 63 TFEU.

(c) Personal scope

52. The personal scope of Article 63 TFEU involves resolving two questions. First, the Court must decide whether that provision applies *ratione personae* to an income funded by the EDF, which is a public fund established by Member States under a financial regulation adopted by those States, and received by a development aid company established in a Member State, and, second, whether an employee of such a company may rely on that fundamental freedom.

53. Advocate General Mengozzi has underlined the 'inherent nature of the free movement of capital, which is a freedom based on the object of the transactions rather than on the nature of the persons who carry them out'.[49] In the same vein, the Court has already held, for instance, that the free movement of capital applied to operations carried out by a non-profit-making charitable foundation[50] and to a tax on a legacy received by a religious association, which was a non-profit-organisation.[51] Moreover, in the event that the Court characterises the EDF as an EC or EU fund, other fundamental freedoms apply to civil servants of the European Union,[52] making those freedoms applicable to different types of movement – personal or material – between the European Union and the Member State.

54. It is beyond all doubt that a company whose development aid projects are funded by the EDF may, as the beneficiary of that capital, challenge the compatibility of the tax rule at issue with the free movement of capital. In general, a worker contributing to the production process or services

47 In that respect, I should also note that MPPs, which are at issue here, are instruments of EU and ACP development cooperation. For example, there have been various MPPs in Nigeria for the 9 states of the region between 1999 and 2012, such as MPP3 (2000-2004), MPP6 (2004-2008) and MPP9 (2008-2012), with EUR 210 million being expended on those programs. See Nwaodu, N.O., Odey, S.A., Emma-Egbumokei, N.S., *The European Union and UN Millennium Development Goals in Nigeria: A Study of the Micro Projects Programmes (MPPs) in the Niger Delta Region*, Africa's Public Service Delivery & Performance Review, AOSIS, 2016, pp. 459-481.

48 See, to that effect, The United Nations Guidelines on the tax treatment of government-to-government aid projects. Available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-09/G-to-G%20PDF.pdf, points 10 and 37.

49 Opinion of Advocate General Mengozzi in *Persche* (C-318/07, EU:C:2008:561, point 35) and see also Opinion of Advocate General Stix-Hackl in *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2005:785, points 58 to 60).

50 Judgment of 14 September 2006, *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568).

51 See judgment of 10 February 2011, *Missionswerk Werner Heukelbach* (C-25/10, EU:C:2011:65).

52 Since the Court has held that the treatment of the income of an official or member of the contract staff of the European Union falls under one of the fundamental freedoms, such as Article 45 TFEU (judgments of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 12 and the case-law cited, and of 6 October 2016, *Adrien and Others*, C-466/15, EU:C:2016:749, paragraph 24 and the case-law cited), then an income financed by the EDF should also fall within the scope of Article 63 TFEU. If income financed directly from the EU budget is susceptible of constituting a restriction to Article 45 TFEU, then funding carried out by the EDF, which is a fund set up by the EU Member States, should fall within the scope of the fundamental freedoms.

of a company is considered an input or a factor of production.[53] In other words, the way the worker is treated affects the company and its input-output value. For example, labour costs affect the number and quality of workers the company can hire. Therefore, since the term 'movement' should cover all the elements of the chain from the EDF to the project in the ACP State,[54] it should also encompass the salary of a worker who participates in that project and constitutes a company's input.

55. Moreover, it is worth noting that the dispute in the main proceedings was, to some extent, triggered by the company at issue, which was initially granted an exemption certificate with respect to RF's salary and which did not withhold tax at source on that salary. As a result of that omission, the German tax authorities decided to claim from RF the income tax that was due for 2011 and 2012. It seems to me that RF should be able to rely on that fundamental freedom in order to protect her salary from taxes that may be incompatible with EU law. For the purposes of both the present dispute and the objectives pursued by the tax rule at issue, the salary received by RF must be seen as part of the capital that the company received from the EDF. As such, RF may rely on that fundamental freedom.

56. In the light of the foregoing, and contrary to the view taken by the German Government at the hearing, I am of the opinion that the tax rule at issue falls within the scope of the free movement of capital laid down in Article 63 TFEU.

2. The existence of a restriction on the free movement of capital

57. It should be recalled that Article 63 TFEU prohibits all restrictions on the movement of capital between the Member States, subject to the justifications laid down in Article 65 TFEU. Although direct taxation falls within the competence of the Member States, it is settled case-law that they must nonetheless exercise that competence consistently with EU law and, in particular, with the fundamental freedoms guaranteed in that Treaty.[55] This means that Member States must refrain from adopting discriminatory measures to the detriment of persons who have exercised their rights to freedom of movement.

58. In accordance with the Court's case-law, the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States.[56]

59. In *Commission* v *Hungary*,[57] in the context of an infringement action, the Court was seised of an examination of the compatibility with the free movement of capital of provisions of national legislation which imposed obligations of registration, declaration and publication on certain categories of civil society organisations *directly or indirectly* receiving support from abroad exceeding a certain threshold and which provided for the possibility of applying penalties to organisations that do not comply with those obligations. It held that those provisions targeted the persons from other Member States or third countries granting financial support to the associations or foundations established in Hungary by providing for the public disclosure of

53 https://www.financereference.com/factors-of-production/.

54 See points 49 and 50 above.

55 Judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 34).

56 See, to that effect, judgment of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 22 and the case-law cited).

57 Judgment of 18 June 2020, *Commission* v *Hungary (Transparency of association)*, C-78/18, EU:C:2020:476, paragraphs 60 and 62.

information on those persons and that financial support, which was likewise such as to deter those persons from providing such support. The Court went on to emphasise that, in so doing, as a whole, those provisions treated not only the associations and foundations established in Hungary which received financial aid that was sent from other Member States or from third countries differently from those which received financial support from a Hungarian source, but also treated the persons who provide those associations and foundations with financial support sent from another Member State or third country differently from those who did so from a place of residence or registered office located in Hungary. [58]

60. In that judgment, the Court found that the differences in treatment depending on the national or *foreign origin* of the financial support in question constitute indirect discrimination on the basis of nationality. [59]

61. In the present case, it is clear from the order for reference that the tax exemption at issue is available only when the development aid project is financed by national budgetary resources. Such financing takes place where the project is financed to a level of at least 75% by a Federal Ministry responsible for development cooperation or by a State-owned private development aid company. By contrast, a development aid project financed by foreign funding, [60] such as the EDF, falls under the Notice from the Ministry of Finance and, therefore, salaries paid under that project by the undertaking in question are to be taxed.

62. By applying the tax rule at issue, the tax treatment of salaries paid by undertakings financed by national budgetary resources and those paid by undertakings financed by foreign funding are not the same. Undertakings financed by foreign capital are subject to a higher tax burden than that applied to undertakings financed by national budgetary resources. The former are consequently in a less favourable position than the latter. [61]

63. Such a difference in tax treatment has an effect on the use of funding received by the development aid companies, [62] namely by increasing the labour costs of the aid projects in question and, thus, reducing the available resources with respect to those projects and the capital made available to the companies. Essentially, on the one hand, the company at issue must decide whether, first, it applies for funding from national budgetary resources or the EDF, second, whether it hires fewer employees or employees who are less competitive in the sector at issue, and/or, third, whether it reduces other costs. The worker, on the other hand, may be faced with choosing foreign aid projects that are less financially advantageous than projects funded from national budgetary resources. If the worker chooses the projects funded by the EDF, tax is withheld at source (or, like in the present case, can be claimed at a later stage) by the competent tax authority, meaning that that person's tax burden is much higher. [63]

64. As a consequence, I take the view that such a tax rule at issue constitutes a restriction on the free movement of capital prohibited by Article 63 TFEU.

58 Ibid., paragraphs 60 and 61.

59 Ibid., paragraph 62.

60 See point 47 above.

61 See, by way of analogy, judgment of 11 October 2007, *Hollmann* (C-443/06, EU:C:2007:600, paragraph 37).

62 See, by way of analogy, judgment of 17 October 2013, *Welte* (C-181/12, EU:C:2013:662, paragraphs 25 and 26 and the case-law cited).

63 In the present case, it was argued at the hearing that the amount paid in tax constituted RS's retirement savings.

3. The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

65. It follows from the case-law in relation to Article 65(1) TFEU, read in conjunction with Article 65(3) thereof, that in order for national tax rules to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must relate to situations which are not objectively comparable or which must be justifiable by an overriding reason in the public interest. [64]

66. First, as regards the comparability of the situations, [65] the German Government stated at the hearing that the situation of an aid project financed by national budgetary resources and one funded by the EDF are objectively different. In particular, it argued that EDF projects may be better financed than nationally funded projects and thus wages related to EDF projects are higher than those related to nationally funded projects.

67. In that regard, it is settled case-law that the comparability of situations must be examined having regard to the aim pursued by the national provisions at issue. [66] In that respect, only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects situations which are objectively different. [67]

68. In the present case, I would note that the tax exemption at issue is tied to a distinguishing criterion that is based, in essence, on the origin of the funds. As regards projects financed by national budgetary resources, the applicant submits that the purpose of the exemption provided for in Paragraph 34(c)(5) of the EStG is to support development aid bodies by helping them to attract the best performing workers. Thus, it appears that the general purpose is to support foreign development projects. The EDF is the main EU instrument in the area of development cooperation, which aims to fund projects, in particular, in the ACP States. In the light of those objectives, projects financed by the EDF and those financed by national budgetary resources should be regarded as being in a comparable situation. Even if the Court were to examine the German Government's justification that the wages of EDF projects are higher than those paid in relation to nationally funded projects, it should be emphasised that the Government has not substantiated that argument, which, in any case, does not rely on the objective of the tax rule at issue. Consequently, I take the view that the difference in treatment at issue in the main proceedings concerns situations that are objectively comparable.

69. Second, according to the Court's settled case-law, a restriction on the free movement of capital is permissible only if it is justified, in the case of direct discrimination, by one of the grounds expressly provided for in the Treaties and, if that is the case, only if it is suitable for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain it. [68]

64 See, to that effect, judgment of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 26 and the case-law cited).

65 In the present opinion, I shall not examine the relevance of the comparability test, which is not at issue (see, in that regard, Opinion of Advocate General Kokott in *Nordea Bank* (C-48/13, EU:C:2014:153, point 22).

66 See, to that effect, judgments of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 38); of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 25); and of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 32).

67 Judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 49), and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 28).

68 See, to that effect, judgments of 25 April 2013, *Jyske Bank Gibraltar* (C-212/11, EU:C:2013:270, paragraph 60); of 6 March 2018, *SEGRO* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 76 et seq.); and of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, EU:C:2020:476, paragraph 76 and the case-law cited).

70. In the present case, it must be stated that the documents before the Court do not specify what objective the national tax authority was pursuing when it established the criterion that the development aid measure had to be financed to a level of at least 75% by national budgetary resources.

71. According to the statements made by the German Government at the hearing, the tax rule at issue falls under Germany's sovereign powers. In that connection, it should be observed that, although it is for each Member State to organise its system for taxing revenues, it is settled case-law that Member States must nevertheless exercise their fiscal autonomy in accordance with the requirements of EU law, in particular those imposed by the provisions of the TFEU on the free movement of capital, which requires that the tax system be designed to be non-discriminatory.[69] Accordingly, the justification at issue should be rejected, without there being any need to examine its proportionality.

4. Interim conclusion

72. In the light of the foregoing, I propose that the answer that the Court should give to the question referred is that Article 63 TFEU must be interpreted as precluding the application of a tax rule of a Member State, such as that at issue in the main proceedings, which provides for an exemption from income tax for the salary received by an employee assigned to development aid activities only where such an activity is financed to the level of at least 75% from national budgetary resources, but which has the effect of depriving an employee of the benefit of such an exemption where he or she is assigned to an activity of that nature financed to the same extent by one of the EDFs.

73. However, in its order for reference, the national court has asked the Court to examine the compatibility of the tax rule at issue with the principle of sincere cooperation enshrined in Article 4(3) TEU, read in conjunction with Articles 208 and 210 TFEU. It is only in the event that the Court does not concur with the above conclusion and nevertheless decides to examine the application of those provisions that I discuss that issue below.

74. Before turning to my analysis of the national court's question as formulated by it, I should emphasise that, as already explained,[70] it follows from the Court's settled case-law that Article 63 TFEU has *direct effect*, so that it may be relied on before national courts and may render national rules that are inconsistent with it inapplicable. However, the principle of sincere cooperation does not have such effect.[71] Moreover, the Court has applied that provision to national tax law on multiple occasions, which is not the case with the principle of sincere cooperation.[72] Therefore, reliance on the fundamental freedoms of the internal market, and in particular on the free movement of capital, is less intrusive on the competences of the Member States than that of Article 4(3) TEU, read in conjunction with Articles 208 and 210 TFEU in the area of parallel competences, which I will discuss below.

[69] See, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraphs 42 and 45 and the case-law cited).

[70] See point 42 above.

[71] See judgments of 24 October 1973, *Schlüter* (9/73, EU:C:1973:110) and of 15 January 1986, *Hurd* (44/84, EU:C:1986:2).

[72] The Court has already held that the principle of sincere cooperation laid down in Article 4(3)TEU cannot be interpreted as giving rise to any independent obligations on Member States beyond those arising from Articles 63 TFEU and 65 TFEU (see, to that effect, judgment of 30 June 2016, *Riskin and Timmermans*, C-176/15, EU:C:2016:488, paragraph 36, and order of 19 September 2012 in *Levy and Sebbag*, C-540/11, not published, EU:C:2012:581, paragraphs 27 to 29).

D. The principle of sincere cooperation applied in conjunction with the rules on competences laid down in the Treaties

75. The referring court asks, in essence, whether the principle of sincere cooperation enshrined in Article 4(3) TEU, read in conjunction with Articles 208 and 210 TFEU, must be interpreted as precluding a national tax rule such as that at issue in the main proceedings.

76. In order to answer that question, I shall first consider the exercise of the competences by the European Union and the Member States in the area of development cooperation. Second, I shall examine whether a national tax rule such as that at issue in the main proceedings constitutes a breach of Article 4(3) TEU, read in conjunction with Article 4(4) and Articles 208 and 210 TFEU. Third, I shall deal with the issue of the direct effect of those provisions.

1. The exercise of competences by the EU and the Member States

(a) The rules on competence in the area of development cooperation and the obligation of efficiency

77. At the outset, I should point out that, depending on the area, the European Union may have exclusive, shared or 'supportive' competences.[73] The areas of those specific competences are listed in Articles 3 to 6 TFEU.

78. In the area of development cooperation, Article 4(4) TFEU states that the European Union 'shall have competence to carry out activities and conduct a common policy', adding that 'however, the exercise of that competence shall not result in Member States being prevented from exercising theirs'. The latter competence is thus not included in the list of 'standard' shared competences set out in Article 4(2) TFEU, which lists areas such as the internal market, agriculture and fisheries, consumer protection and transport.[74] As regards shared competences, Article 2(2) TFEU follows the principle of pre-emption whereby 'the Member States shall exercise their competence to the extent that the Union has not exercised its competence'. By contrast, the competence rule set out in Article 4(4) TFEU[75] states that the exercise of the competence of the European Union does not prevent the Member States from exercising theirs. It 'is carved out as what could be called a "non-principal area of shared competence"',[76] a

[73] See Article 2(1), 2(2) and 2(5) TFEU. The term 'supportive' encompasses the competences to carry out actions to support, coordinate or supplement the actions of the Member States that the European Union has according to Article 2(5) TFEU.

[74] Article 4(2) TFEU is to be read in conjunction with Article 2(2) TFEU. In contrast, pursuant to Article 2(1) TFEU, exclusive competences prevent Member States from acting, and, similarly, according to Article 2(2) TFEU, shared competences preclude Member States from acting, once the competence has been exercised by the EU.

[75] Article 4(3) TFEU contains broadly similar wording in relation to competences in the areas of research, technological development and space.

[76] Cardwell, P.J., Jančić, D., 'The European Parliament and development cooperation: democratic participation in the 'low politics' of EU external relations', *Journal of European Integration*, 2019, 41:3, pp. 365-381, DOI: 10.1080/07036337.2019.1599369.

'non-pre-emptive competence'[77] or a 'shared parallel competence'.[78] In short, Article 4(4) TFEU has the peculiarity of allowing both the EU and the Member States to exercise their competences in parallel.[79]

79. Moreover, Article 4(4) TFEU is to be read in conjunction with Articles 208 and 210 TFEU, which are specific Treaty provisions on the area of development cooperation. In particular, Article 208(1) TFEU states that the EU's and the Member States' competences are to 'complement and reinforce each other'. Article 210(1) TFEU further provides that in order to promote the complementarity and *efficiency* of their action, the EU and the Member States may undertake joint action and that Member States are to, where necessary, contribute to the implementation of EU aid programmes.

80. It follows, in my view, that Article 4(4), Article 208(1) and Article 210(1) TFEU, as stand-alone provisions, impose an obligation on the European Union and the Member States to reinforce each other's actions in the area of development cooperation in order to make those actions *efficient*. In addition, Article 4(4) TFEU states that the exercise of the EU's competence in the area of development cooperation 'shall not result in Member States being prevented from exercising theirs'. However, those Treaty provisions are silent as to whether a similar negative obligation exists in respect of the Member States, according to which they must refrain from hindering or hampering the exercise of the EU's competence in the area of development cooperation. Therefore, an interpretation of Article 4(4), Article 208(1) and Article 210(1) TFEU that incorporates reciprocity between the EU and the Member States requires, in my view, having recourse to the principle of sincere cooperation.

(b) The principle of sincere cooperation enshrined in Article 4(3) TEU

81. For the purposes of the present case, the wording of the third subparagraph of Article 4(3) TEU seems to be highly relevant. That subparagraph imposes an obligation on the Member States to 'facilitate the achievement of the Union's tasks' and to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'.[80] Hence, it imposes a positive duty to facilitate the achievement of the EU's tasks and a general prohibition on the Member States adopting any such measure. I would add that that paragraph refers to the EU's tasks and objectives, rather than to EU law.[81]

77 See Cremona, M., 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process', in Dashwood, A. and Maresceau, M. (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge, Cambridge University Press, 2008, p. 44.

78 See, Opinion of Advocate General Ćapeta in *ÖBB-Infrastruktur Aktiengesellschaft* (C-500/20, EU:C:2022:79, footnote 59).

79 The pre-emption rule can be defined as 'once the EU has regulated an issue, Member States cannot regulate it on their own for as long as the EU regulation remains in force' (Opinion of Advocate General Ćapeta in *ÖBB-Infrastruktur Aktiengesellschaft*, C-500/20, EU:C:2022:79, point 73). Article 4(4) TFEU seems to be an exception to Articles 2(2) and 4(2) TFEU that set out the shared competences and pre-emption rule, but does not appear to fall under Article 2(5) TFEU, which sets out the EU's competences to support, coordinate or supplement the actions of the Member States.

80 See, for example, judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 148).

81 See, to that effect, judgment of 5 December 2017, *Germany* v *Council*, (C-600/14, EU:C:2017:935, paragraph 105). See, more generally, Klamert, M., 'Article 4', in Kellerbauer, M., Klamert, M., and Tomkin, J. (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford University Press, Oxford, 2019, paragraph 26 et seq., Guastaferro, B., 'Sincere Cooperation and Respect for National Identities' in Schütze, R., and Tridimas, T., *Oxford Principles of European Union Law: The European Union Legal Order*, Volume 1, Oxford University Press, 2018, pp. 354-383, and Roes, T., *Limits to Loyalty: the Relevance of Article 4(3) TEU*, *Cahiers de Droit Européen*, Issue 1, 2016, pp. 253-284.

82. As regards context, I would point out that in the area of development cooperation, Article 4(3) TEU should be read in conjunction with the objectives referred to in Article 21 TEU.[82] It is precisely in that context that the Member States are obliged, by reason of the principle of sincere cooperation set out in the third subparagraph of Article 4(3) TEU, to refrain from adopting any measure which could render the achievement of the EU's tasks more difficult or jeopardise the attainment of the EU's objectives.

83. As regards the scope of the principle of sincere cooperation, that principle applies irrespective of whether the competence concerned is exclusive or shared.[83] For instance, in *Commission* v *Sweden*,[84] the Court held that the Kingdom of Sweden had infringed Article 4(3) TEU by unilaterally proposing the addition of a particular substance to the annex to an international convention in an area of shared competence. By doing so, that Member State 'dissociated itself from a concerted common strategy within the Council', which had consequences for the European Union.[85] In my view, that case-law should also be transposable to the area of 'shared parallel' competences. Indeed, the fact that the European Union has exercised its power, regardless of its nature, means that the Member States must respect the objectives the European Union is trying to attain in the area in question.

84. Therefore, it follows from Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU, that the Member States are required to facilitate the achievement of the EU's tasks and not to jeopardise the attainment of the objectives the European Union pursues in the area of development cooperation and namely to guarantee the efficiency of the EU's actions in that area.[86]

(c) Application to the present case

85. In the present case, it should be noted that there are two sets of different competences that have been exercised. First, the European Union has exercised its 'shared parallel competence' in the area of development cooperation pursuant to Article 4(4), and Articles 208 and 210 TFEU.

86. In particular, externally, together with the Member States, it concluded the Lomé IV Convention and the Cotonou Agreement, which were approved by Council decisions.[87] The Court has already held that the Member States and the European Union are 'jointly liable' for the obligations stemming from the Lomé IV Convention.[88] Internally, the obligations stemming from those agreements were implemented by the European Union by Financial Regulation 91/491/EEC, applicable to the Seventh EDF, and the Financial Regulation of 27 March 2003, applicable to the

82 Judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)*, C-180/20, EU:C:2021:658, paragraph 49 and the case-law cited.

83 See, to that effect, judgments of 2 June 2005, *Commission* v *Luxembourg* (C-266/03, EU:C:2005:341, paragraph 58), and of 14 July 2005, *Commission* v *Germany* (C-433/03, EU:C:2005:462, paragraph 64).

84 See judgment of 20 April 2010, *Commission* v *Sweden* (C-246/07, EU:C:2010:203).

85 See judgment of 20 April 2010, *Commission* v *Sweden* (C-246/07, EU:C:2010:203, paragraph 91). It should be also stated that in that case the Court applied Article 4(3) TEU *autonomously*, as a stand-alone provision, since the obligation to cooperate flows from the requirement of unity in the international representation of the European Union.

86 See points 79 and 80 above.

87 As regards the Cotonou Agreement, it seems, in the light of Articles 2, 3 and 12 of that agreement, that, in order to implement it, the parties to that agreement must coordinate their policies, that is to say, the positive measures taken in favour of the States concerned, but not the means of those policies. Similar obligations stem from Articles 2 and 9 of the Lomé IV Convention.

88 In particular, the Court held that the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance (judgment of 2 March 1994, *Parliament* v *Council*, C-316/91, EU:C:1994:76, paragraph 29). That case-law should be applicable, *mutatis mutandis*, to the Cotonou Agreement.

Ninth EDF. As already explained, the Commission is responsible, under the agreements and conventions setting up the various EDFs and by the corresponding financial regulations, for the management of the Seventh and Ninth EDFs.[89] It follows from that framework that, in the present case, the EU has exercised its 'shared parallel' competence externally by way of concluding the mixed agreements mentioned above and internally by adopting the financial regulations at issue.

87. Second, by the tax rule at issue, Germany adopted a tax measure in the area of direct taxation, which, as the law currently stands, is not a matter for the European Union,[90] but falls under the Member States' retained powers. Similarly, in adopting the tax rule, Germany was also exercising its competence in the area of development cooperation, since the object of that rule is development aid.

88. While it is true that the case-law cited above[91] gives no indication whether and, if so, how the principle of sincere cooperation enshrined in Article 4(3) TEU applies in respect of the 'shared parallel' competences set out in Articles 4(4), Article 208(1) and Article 210(1) TFEU, I take the view that those indications can be found by having recourse to the so-called 'framing of powers' doctrine.[92] According to that doctrine, the Member States are under a general obligation to exercise their retained powers while having due regard to EU law. In that respect, even if, in the current state of the development of EU law, direct taxation falls within the competence of the Member States, they must nevertheless exercise that competence in compliance with EU law[93] and, also, I would argue, consistently with the EU's tasks and objectives. The same applies when a Member State exercises its competences in the area of development cooperation. Therefore, actions taken by Member States in areas which have not been subject to (or cannot be subject to) harmonisation within the European Union, such as direct taxation and development cooperation, are not excluded from the scope of the principle of sincere cooperation enshrined in Article 4(3) TEU.

89. In the light of the foregoing, it follows from Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU, that even when the Member States are exercising their retained competences in the areas of direct taxation and development cooperation, they are required to facilitate the achievement of the European Union's tasks and not to jeopardise the attainment of the objectives that the European Union pursues in the area of development cooperation.

2. The existence of a breach of Articles 4(4), Article 208(1) and Article 210(1) TFEU, in conjunction with Article 4(3) TEU

90. At the outset, I should emphasise that, when Member States agree to create a common fund, such as the EDF, they should create rules with respect to income taxation of the funding in the framework concerning that fund. However, in the absence of such rules, the Court must examine

89 See point 45 above.

90 See, to that effect, judgments of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 43), and of 23 February 2016, *Commission* v *Hungary*, (C-179/14, EU:C:2016:108, paragraph 171 and the case-law cited).

91 See point 83 above.

92 That doctrine has been applied by the Court in cases, for example, in the area of social security, the organisation of education systems, the organisation of justice, and in direct taxation. See, more generally, Azoulai, L., 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' *European Journal of Legal Studies*, (2011) 4, p. 192.

93 See judgment of 12 July 2012, *Commission* v *Spain* (C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited).

the present case in the light of the existing primary law provisions. The issue that arises is what constitutes a breach of those Treaty provisions, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU.

91. Since the Member States are required to facilitate the achievement of the EU's tasks and not to jeopardise the attainment of the objectives that the European Union pursues in the area of development cooperation, it follows, in my opinion, that they should not impose any measures that reduce the efficiency of the EU's actions in that area. Moreover, it is the duty of the Member States to create the appropriate conditions to achieve that task or objective. Thus, any tax measure that may reduce funding that seeks to finance a development aid project in the recipient ACP State does not facilitate the achievement of the EU's task and makes it harder to attain the objectives pursued by the European Union in the field of development cooperation. Indeed, the taxation by Member States of the funding granted by the EDF reduces the amount of financial support that is received by the recipients of the aid projects in question in the ACP States and forms *financial obstacles* to those projects.[94] Therefore, that tax measure constitutes a breach of those provisions.

92. In particular, as stated by RF,[95] account should be taken of the objectives set out in Article 21(2)(d) TEU and in the Cotonou Agreement, namely those in relation to 'poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy'. By setting up the EDF and the MPPs in order to promote a wide range of projects in the ACP States,[96] the European Union and the Member States implemented very specific means for attaining those broad objectives.[97] In other words, the financing granted by the EDF in order to fund the activities carried out by the MPPs constitutes the concrete manifestation of those objectives. In that respect, the MPPs constitute a 'UN charted EU intervention', with the purpose of meeting the basic needs of the entire population.[98]

93. It follows that when the EDF grants money to an MPP, its aim is to finance the programme at issue and to support the local population benefiting from that project. Conversely, its purpose is not to finance the budget of one of the Member States.[99] Therefore, notwithstanding the contributions in relation to the social security of the workers or to other similar services provided by the Member States, those states should not, in principle, tax the projects and personal income in relation to projects funded by the EDF. Taxing such projects directed at ACP States has the effect of reducing the amount of financial support that is received by the recipients of the aid projects in question in those states and constitutes, *in itself*, a breach of Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with Article 4(3) TEU.

94 See, to that effect, the judgment in *Bruce of Donington* (C-208/80, EU:C:1981:194, paragraphs 14 to 20).

95 See paragraph 44 of her observations.

96 Indeed, the MPPs can involve a wide range of projects, 'from the school blocks, health centres, water and sanitation projects, oil and palm kernel processing plants, market stalls, culverts among others, the processes were designed in conformity to positively bring about an egalitarian society; impacting equally on both the poor and the minority groups in the society' (See footnote 47 above).

97 For example, as regards the rural communities of the oil producing states of Nigeria (the Niger Delta), it has been stated that the EU's interventions 'clearly shows' its commitment towards the 'global drive for the eradication of poverty'. Between 1999 and 2012, the expenditure for the three MPPs for the nine states of the region was more than EUR 210 million. It has been reported that the MPPs actually reduced the level of poverty in the region through the provision of over 20 000 micro-projects to more than 4 000 rural communities in the nine states it covered. (See footnote 47 above).

98 Ibid.

99 It should be noted in that respect that the foreign aid projects financed to a level of at least 75% by national budgetary resources are exempted from income revenue taxation. It shows that, technically, there are no obstacles for the exemption of those revenues.

94. Moreover, in order to determine whether there is a breach of those provisions, it is not necessary to establish that there has been a difference in the tax treatment of projects financed by national resources and those financed by the EDF. Therefore, unlike restrictions on the free movement of capital, a breach of those Treaty provisions can take place even in the absence of a difference in the tax treatment of those two types of projects. Since any national tax measure that does not facilitate the achievement of the EU's task or makes it harder to attain the EU's objectives in the field of development cooperation breaches the principle of sincere cooperation, the issue whether the tax rule at issue places the projects funded by the EDF and the employees working on that project at a disadvantage is irrelevant for the purposes of establishing a breach of those Treaty provisions. On the contrary, for the purpose of applying those provisions, it is sufficient to establish difficulty in carrying out the EU's task or objective in an efficient manner.

3. Direct effect

95. Direct effect is the ability of an EU law rule to be justiciable at national level, directly before the national judge, without the need for any further 'intermediary' of national law.[100] As far as primary legislation is concerned, the Court established the principle of direct effect in the *Van Gend & Loos* judgment,[101] with the proviso, however, that the obligations must be sufficiently clear, precise and unconditional to confer on individuals a right capable of being relied on as such before a national court.[102] In my view, the succinctly worded Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU, cannot possibly be interpreted as containing such obligations. The same is true of the provisions of the Lomé IV Convention and the Cotonou Agreement, which were discussed at the hearing by the parties.[103]

96. Nevertheless, in the present case, the act that contains direct effect is the decision of the Commission or the authorising officer decision whereby the Commission decides to award a procurement contract or a grant allowing the funding to the company at issue. In principle, there should be a procurement or grant decision or a contract between the Commission, acting on behalf of the EDF, and the company at issue, which specifies the obligations of each party. Unfortunately, that act does not appear in the Court file. However, it follows from the provisions of the financial regulations at issue that the Commission acts as an authority, which can adopt legally binding decisions with third parties.[104] In the present case, that decision can be relied upon by the company at issue and, thus, by RF. However, it is for the national court to establish the existence and content of that individual decision.

100 Opinion of Advocate General Bobek in *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2021:759, point 32).

101 Judgment of 5 February 1963 (26/62, EU:C:1963:1).

102 See judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 58 and 61).

103 Reference was made namely to Articles 2, 3 and 9 of the Cotonou Agreement.

104 See the powers and the decisions of the Commission and the authorising officer set out in Articles 17 to 24 of Financial Regulation 91/491, applicable to the Seventh EDF, and Articles 50 to 53 of the Financial Regulation of 27 March 2003 applicable to the Ninth EDF. Moreover, I should point out that contracts concluded by undertakings and the Commission which are financed by the EDF were governed by the general conditions for service contracts financed by the EDF, laid down in Annex IV to Decision No 3/90 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulations, general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the EDF and concerning their application (OJ 1990 L 382, p. 1).

4. Interim conclusion

97. In the light of the foregoing, I propose that the answer that the Court should give to the question referred is that Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU, must be interpreted as precluding the application of a tax rule of a Member State which deprives an employee of the benefit of a tax exemption on the grounds that that employee is assigned to development aid activities financed by the EDFs, since such taxation of the funding granted by the EDF by Member States has the effect of reducing the amount of financial support that is received by the recipients of the aid projects in question in the third countries and forms financial obstacles to those projects.

IV. Conclusion

98. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany):

(1) Article 63 TFEU must be interpreted as precluding the application of a tax rule of a Member State which provides for an exemption from income tax for the salary received by an employee assigned to development aid activities only where such an activity is financed to the level of at least 75% from German budgetary resources (either the Federal Ministry responsible for development aid or the Gesellschaft für internationale Zusammenarbeit), but which has the effect of depriving an employee of the benefit of such an exemption where he or she is assigned to an activity of that nature financed to the same extent by one of the European Development Funds (EDFs).

(2) In the alternative:

Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU, must be interpreted as precluding the application of a tax rule of a Member State which deprives an employee of the benefit of a tax exemption on the grounds that that employee is assigned to development aid activities financed by the EDFs, since such taxation of the funding granted by the EDF by Member States has the effect of reducing the amount of financial support that is received by the recipients of the aid projects in question in the third countries and forms financial obstacles to those projects.