Case C-277/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 April 2023

Referring court:

Ustavni sud Republike Hrvatske (Croatia)

Date of the decision to refer:

18 April 2023

Appellant:

E.P.

Other party to the proceedings:

Ministarstvo financija Republike Hrvatske, Samostalni sektor za drugostupanjski upravni postupak

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Subject matter of the main proceedings

The constitutional complaint brought by the Croatian national, E.P., against, inter alia, the decision of the Porezna uprava Ministarstva financija Republike Hrvatske (Tax Administration of the Finance Ministry of the Republic of Croatia), in which that authority calculated her liability to pay income tax and the local income tax supplement for 2014 without recognising her right to a personal allowance for her dependent child, A.B, who, as a student, was exercising the right to move and reside freely in another Member State for the purpose of education and, in the academic year 2014/2015, received student mobility support from the Finnish university of Y via non-repayable Erasmus+ funds to stay in another Member State of the European Union (Finland) and study for a Master’s Degree, in excess of the maximum limit stipulated in Croatian law for the purposes of exercising the right to increase the annual basic personal income tax allowance for a dependent family member.

Subject matter and legal basis of the request

Request for interpretation of EU law pursuant to Article 267 of the Treaty on the Functioning of the European Union, seeking interpretation of Articles 18, 20 and 21 and the second indent of Article 165(2) TFEU, as well as of Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 29.4.2002, p. 1) ('Regulation No 883/2004').

Questions referred for a preliminary ruling

I. Should Articles 18, 20, 21 and the second indent of Article 165(2) of the Treaty on the Functioning of the European Union (OJ 2016 C 202, p. 1) be interpreted as precluding legislation of a Member State under which a parent loses the right to increase the annual basic income tax allowance for a dependent child who, as a dependent student having exercised his or her right freely to move and reside in another Member State for the purpose of study, has availed himself or herself, on the basis of national implementing acts, of the measures provided for in Article 6(1)(a) of Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus +': the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC (OJ 2013 L 347, p. 50) for the purpose of facilitating mobility from a Member State with lower or middle average living costs to a Member State with higher average living costs, as determined according to the criteria of the European Commission set out in Article 18(7) of that regulation, when that child receives student mobility support which exceeds a certain fixed limit?

II. Should Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2002 L 166, p. 1) be interpreted as precluding legislation of a Member State under which a parent loses the right to increase the annual basic income tax allowance for a dependent student who, while studying in another Member State, availed himself or herself of the student mobility support provided for in Article 6(1)(a) of Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus+': the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC (OJ 2013 L 347/50)?

Provisions of European Union law relied on

Articles 6(e), 18, 20(2)(a), 21(1) and the second indent of Article 165(2) TFEU

Articles 6(1)(a), 18(7), 27(12), 35 and 36(3) of Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus +': the Union programme for education, training, youth and sport and

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repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC (OJ 2013 L 347, p. 50)

Articles 2(2), 3(1), 7(1)(c) and 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77)

Article 1(a) and (z) and Articles 2, 7 and 67 of Regulation No 883/2004

Provisions of national law relied on

Ustav Republike Hrvatske (Constitution of the Republic of Croatia)

1 According to Article 14 of the Ustav Republike Hrvatske (Constitution of the Republic of Croatia) (*Narodne novine*, nos 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14; 'the Constitution'), everyone in the Republic of Croatia enjoys rights and freedoms regardless of, inter alia: their social origin, their social position or any other attributes. Everyone is equal before the law.

2 Article 48 of the Constitution guarantees the right to property, while Article 51 provides that everyone is obliged to contribute to public finances according to their economic ability and that the tax system is based on the principles of equality and justice.

3 According to Article 64 of the Constitution, parents have the duty to raise, maintain and educate their children and have the right and freedom independently to decide how to bring up their children.

4 Article 141c of the Constitution addresses certain issues of EU law, such as the principles of equivalence, primacy and direct applicability of EU law, and Article 141d sets out the rights of Croatian citizens as citizens of the EU, including the right to move and reside freely within the territory of any Member State and how to exercise those rights.

Zakon o porezu na dohodak iz 2004 (Income Tax Law of 2004)

5 Title I, entitled 'Basic Provisions' of the Income Tax Law (*Narodne novine*, nos 177/04, 73/08, 80/10, 114/11, 22/12, 144/12, 43/13, 120/13, 125/13 and 148/13; 'ZPD/04'), in the version applicable to the facts of the main proceedings, includes Chapter 4, entitled 'Taxable basis', Article 6(1) of which stipulates that the taxable amount for a resident shall be the total amount of income from employment, self-employment in accordance with paragraph 3 of that article, property and property rights, capital, insurance and other income that the resident

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has earned at home or abroad (unlimited tax liability), less the personal allowance referred to in Article 36 and/or Article 54 of the Income Tax Law.

6 Chapter 8 of that title, entitled 'Income tax exempt proceeds', contains Article 10(1)(12), (13), (14), (18) and (20), which provides that income tax is not payable, inter alia, on scholarships paid to pupils in formal education at secondary schools, colleges and higher educational institutions, up to a certain limit; on scholarships for students in formal education at colleges and higher educational institutions, undertaking doctoral studies and post-doctoral traineeships, for which funds are planned in the Croatian state budget; and on scholarships awarded from the EU budget, under separate international agreements, to students in formal education at higher educational institutions; for sports scholarships payable to training athletes under separate regulations, up to a certain limit; for scholarships for students selected in public competitions which all students may enter under identical conditions; for formal education at higher education institutions paid for by foundations, foundations established for a specific period of time, institutions and other entities registered in Croatia for educational or scientific and research purposes operating under specific regulations, established with the intention of granting scholarships; and on income deriving from non-reimbursable benefits from EU funds and programmes received through bodies accredited in Croatia in accordance with EU rules for promoting mobility within the framework of EU programmes and funds for education and vocational training, in accordance with the Commission's Financial Regulation, up to specified amounts.

7 Title IV of ZPD-a/04, entitled 'Personal allowance or untaxed portion of income', includes paragraph 1 of Article 36, which provides, inter alia, that the total amount of income earned by a resident in accordance with Article 5 of that Law is reduced by a basic personal allowance of HRK 2 200.00 for each month of the tax period being assessed. Article 36(2)(2) provides, inter alia, that residents can increase the personal allowance referred to in paragraph 1 if they have dependent children, by an amount equal to 0.5 of the basic personal allowance for the first child and 0.7 for the second. Article 36(3) provides, inter alia, that during the tax accounting period, a resident is entitled to the personal allowances set out in paragraphs 1 and 2 when determining the advance payment of income tax on paid employment pursuant to Article 45 of the Law. Article 36(4) provides, inter alia, that dependent immediate family members and dependent children are natural persons whose taxable receipts, non-taxable receipts and other receipts that are not considered income within the meaning of the law in question do not exceed, on an annual basis, five times the basic allowance referred to in paragraph 1 of the article. Article 36(5) provides that, as an exception to paragraph 4, receipts received under separate legislation from social assistance, child allowance, maternity benefits, namely the newborn layette benefit, and survivor's pensions following the death of a parent shall not be taken into account in determining the personal allowance for immediate family members and dependent children. Lastly, Article 36(7) provides that 'children' within the meaning of paragraph 2 are defined as children maintained by, inter alia, their parents, as well as children who have completed

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their formal education, until they take up their first job, if they are registered with the Hrvatski zavod za zapošljavanje (Croatian Employment Service).

8 Title VII of ZPD/04, entitled 'Special concessions, exemptions and incentives', contains Section 2, entitled 'Concessions for areas covered by aid […]', Article 54(1) of which provides, inter alia, that taxpayers who are residents who have their home in local government territorial units classified as assisted areas in accordance with separate regulations on regional development in Croatia are, by derogation from Article 36(1), subject to a monthly basic allowance of 2 700.00 HRK if their place of residence is in a group II-assisted area. Article 54(2) provides, inter alia, that the allowance for residents for dependent family members and children is calculated by applying the factor defined in Article 36(2)(2) to the basic personal allowance set out in Article 54(1), provided that those family members and children are also residents of the assisted area referred to in paragraph 54(1).

Zakon o porezu na dohodak iz 2016 (Income Tax Act of 2016)

9 Article 14, entitled 'Determination of the personal allowance', of the Zakon o porezu na dohodak (Income Tax Act) (*Narodne novine*, nos 115/16, 106/18, 121/19, 32/20, 138/20 and 151/22; 'ZPD/16') provides in paragraph 1 that the basic personal allowance is set at EUR 331.81. Paragraph 2 specifies that the basic personal allowance and parts of the personal allowance for dependent immediate family members and children are calculated by applying certain factors and the basic allowance referred to in paragraph 1. Paragraph 4 of that article provides that a resident may increase the basic personal allowance set out in paragraph 2 by a factor of, inter alia, 0.7 for dependent immediate family members and for the first dependent child, amounting to EUR 232.27, and of 1.0 for a second dependent child, amounting to EUR 331.81. Paragraph 8 of this article states that the taxpayer's personal allowance is the basic personal allowance plus the personal allowance to which the taxpayer is entitled under the terms of the ZPD/16.

10 Article 17 ZPD/16, entitled 'Conditions for granting the personal allowance', provides that dependent immediate family members and dependent children are deemed to be individuals whose taxable receipts, non-taxable receipts and other receipts that are not considered income within the meaning of ZPD/16 shall not exceed, on an annual basis, six times the amount of the basic personal allowance referred to in Article 14(3). Article 17(2)(10) provides that, by way of exception to Article 17(1), when determining entitlement to the personal allowance for dependants, no account shall be taken of receipts obtained under separate social assistance legislation, including scholarships, study awards for pupils and students paid from the budget, and non-repayable funds paid from the budget, European Union funds and programmes and other international funds and programmes regulated by separate legislation and international agreements, for the purposes of education and vocational training.

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Zakon o suzbijanju diskriminacije (Law on combating discrimination)

11 Article 1 of the Zakon o suzbijanju diskriminacije (Law on combating discrimination) (*Narodne novine*, nos 85/08 and 112/12; the 'ZSD'), entitled 'Aim of the law', states that the Law provides for the protection and promotion of equality, creates conditions for equal opportunities and regulates protection against discrimination on the basis of, inter alia, ethnic or social origin, financial status, education, social status, marital or family status, or age. Discrimination is defined as putting any person, as well as persons who have family or other ties to that person, in a less favourable position on the basis of, inter alia, the aforementioned considerations.

12 Article 2 of the ZSD, entitled 'Direct and indirect discrimination', provides that direct discrimination is conduct based on one of the grounds listed in Article 1(1) of the ZSD which places, has placed or could place a person in a less favourable situation in relation to another person in a comparable situation and also that indirect discrimination occurs when an apparently neutral provision, criterion or practice places or may place such persons in a less favourable situation in relation to persons in a comparable situation for one of the reasons listed in Article 1(1) of the ZSD, unless such provision, criterion or practice can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

13 Article 8 of the ZSD, entitled 'Scope of application', provides that the Law is applicable to the conduct of all state bodies, local and district (regional) government bodies, legal persons exercising public authority and all legal and natural persons, particularly in the fields of education, science and sport.

14 Article 9 of the ZSD, entitled 'Prohibition of discrimination and exceptions to the prohibition of discrimination', provides that discrimination in all its forms is prohibited and provides that, by way of exception, placing a person in a less favourable position, including where social policy measures are applied in favour of more disadvantaged individuals or households, does not constitute discrimination, provided that such measures do not lead to direct or indirect discrimination on grounds of gender, sexual orientation, race, colour, ethnicity, religious belief or disability.

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Succinct presentation of the facts and procedure in the main proceedings

15 The appellant is a Croatian national, and as such is liable to pay income tax and a local income tax supplement. She is a resident in an assisted area of Croatia, classified in group II according to the Decision on the classification of local and district (regional) government authority by level of development (*Narodne novine*, no 158/13), and is therefore entitled to the tax concessions set out in Title VII, Chapter 2 ZPD/04. The appellant is married, is the mother of two dependent children and derives her income mainly from paid employment. In previous tax periods, until 2014, she had exercised her right to increase her basic allowance for

a dependent child, who at the time in question was a second-level student at Y University.

16 On 8 December 2014, the Erasmus+ Study Tour Agreement – Academic Year 2014/15 (the 'Erasmus+ Agreement') was concluded with the University of Y. Article 3.5 of this agreement sets the student mobility support for a dependent child granted for a five-month second-level study stay in another Member State of the European Union, specifically Finland, at EUR 2 300.00, or EUR 460.00 per 30 days or 'one month of mobility in Finland'. Before leaving to study in Finland at the end of 2014, Y University paid the dependent child an advance for this support of EUR 1 840.00 from the Erasmus+ programme, an amount which, at the relevant conversion rate, indisputably exceeds the regulatory limit of HRK 11 000.00.

17 When the appellant submitted her income tax return for 2014, instead of being refunded the income tax and local income tax supplement, as she was expecting, she was assessed as owing a shortfall in the income tax and local income tax supplement on the sole basis that for the period from 1 January to 31 December 2014, pursuant to Article 36(4) and (5) ZPD/04, she was not entitled to a personal allowance for a dependent family member – her child A.B. – as the receipts for 2014 exceeded HRK 11 000.00.

18 Specifically, the tax assessment of the Porezna uprava Ministarstva financija Republike Hrvatske (Croatian tax office) dated 27 July 2015 ('the tax decision at issue') states that, in 2014, the appellant received income from wages totalling HRK 218 409.00 and other income totalling HRK 3 674.59, resulting in a total annual income of HRK 223 083.78, which was reduced by her annual basic allowance of HRK 48 600.00 to a basic taxable income of HRK 174 483.78. By applying a progressive income tax rate of 12%, 25% and 40%, plus the local income tax supplement of 5%, the total income tax liability amounted to HRK 50 521.51 and the local income tax supplement to HRK 2 525.08. As HRK 48,487.25 of income tax and of local income tax supplement had previously been paid through deductions from her remuneration for 2014, the decision at issue required the appellant to pay the difference of HRK 4 560.34. Although the appellant claimed she had two children, namely two dependent family members, it is not possible to establish how the tax office had calculated the total annual basic allowance of HRK 48 600.00 on the basis of the disputed tax assessment.

19 The appellant lodged an appeal against the assessment with the Samostalni sektor za drugostupanjski upravni postupak Ministarstva financija Republike Hrvatske (Independent administrative appeals office of the Ministry of Finance of the Republic of Croatia), which the latter dismissed as unfounded in its decision of 17 July 2019 ('the second instance decision').

20 The appellant then challenged the disputed second instance decision in administrative proceedings before the Upravni sud u Osijeku (Osijek

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Administrative Court, Croatia), which, in its judgment of 30 January 2020 ('the first instance judgment'), dismissed the complaint as unfounded.

21 The appellant subsequently lodged an appeal against the first instance judgment with the Visoki upravni sud Republike Hrvatske (the Administrative Court of Appeal of the Republic of Croatia, Croatia), which the latter dismissed in its judgment of 20 January 2021 ('the judgment of the Administrative Court of Appeal').

22 The appellant filed a constitutional complaint against the judgment of the Administrative Court of Appeal with the Ustavni sud Republike Hrvatske (Constitutional Court of the Republic of Croatia, Croatia), which requested a preliminary ruling.

The essential arguments of the parties in the main proceedings

23 In her appeal in the second-instance administrative proceedings, the appellant alleged a breach of the principle of non-discrimination established by EU law, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the ZSD, based on her child's status as a beneficiary of the Erasmus+ student mobility programme.

24 Her plea was essentially that the interpretation under which she lost the right to an increased basic allowance for a dependent child is unreasonable because student mobility support from the Erasmus+ programme, as targeted and non-refundable funding from an EU programme, should be classified as social assistance paid on the basis of separate legislation within the meaning of Article 36(5) ZPD/04, and should therefore not be taken into account when determining the tax allowance. She explained that the support is determined in accordance with the Commission's criteria, so that the mobility costs of students are only partially subsidised in accordance with the level of economic and social development of the host Member State. She argued that this support constituted neither taxable receipts of the child nor income by which the appellant would be relieved of her obligation to contribute to maintenance or which would significantly relieve her of that obligation, as she paid EUR 390.00 per month for her student accommodation in Finland alone, leaving only EUR 70.00 of the amount of student mobility support for her child at the end of the month, while food, transport and other living costs are much higher in Finland than if the child had studied in Croatia. Therefore, the appellant argued that the mere fact that she benefited from measures to promote student mobility within the EU placed her in a less favourable position and, in particular, that it put her in a less favourable position than tax residents in Croatia whose children received support under the Erasmus+ programme to study in other EU Member States, such as Bulgaria or Hungary, where the corresponding student mobility support was EUR 360.00 per month. In those cases, the advance payment amounting to 80% of the support was less than the aforementioned HRK 11 000.00, which meant that the parents of those students, unlike the

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appellant, did not lose their right to increase the basic allowance for a dependent child.

25 With regard to the disproportionate nature of the financial burden that this tax measure has imposed on her, the appellant explained that the described tax treatment of student mobility support has resulted in her forfeiting, in addition to the tax difference of HRK 4 560.34 that she must pay, the right to a rebate of overpaid tax, which had previously amounted to HRK 4 500.00, as a resident of a group II-assisted area of Croatia, resulting in a total loss, due to the contested tax measure, in excess of HRK 9 000.00, in addition to the other expenses she has incurred in connection with her child's studies in Finland.

26 During the second-instance administrative proceedings, the Ministarstvo financija (Croatian Ministry of Finance) indicated that it could not be claimed that the parents of children who receive a 'scholarship' are put at a disadvantage, since the payment of Erasmus+ funds is not listed among the receipts that are disregarded when determining the status of a dependent family member pursuant to Article 36(5) ZPD/04.

27 During the administrative court proceedings, the appellant additionally pointed out that in 2018 the legislature amended Article 36(5) ZPD/04, specifying in Article 17(2) ZPD/16 that scholarships and non-repayable funds paid from the budget or European Union funds and programmes for educational purposes are not counted when determining the basic allowance for dependent family members. She also referred to recital 40 of Regulation No 1288/2013, which recommends that non-repayable funds and financial support paid under the Erasmus+ programme be exempted from taxation or 'social costs'. She also highlighted a violation of the obligation set out in Article 141c Ustav (the Constitution).

28 The Ministarstvo financija emphasised in the administrative court proceedings that it considers the complaint unfounded for the reasons mentioned in the disputed second instance decision.

29 In its first instance judgment, the Osijek Administrative Court dismissed the complaint because it classified support for student mobility under the Erasmus+ programme as a 'scholarship' and stated that scholarships are not listed in Article 36(5) ZPD/04 as receipts that are not counted when determining the basic allowance for dependent family members. With regard to the allegation of discrimination, after examining Articles 2 and 9 of the ZSD, the court concluded that the limit set out in Article 36(4) ZPD/04 (HRK 11 000.00) constitutes a social policy measure that is not discriminatory, as it has a legitimate aim and the means of achieving that aim are appropriate and necessary. With regard to the claims of subsequent amendments to the law regarding the tax treatment of the parents of children receiving this support, the court held that this provision was not in force at the time of the tax decision at issue, and with regard to recital 40 of Regulation 1288/2013, it held that the provision had no binding legal force.

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30 In her appeal against the first instance judgment, the appellant reiterated the pleas she raised at the earlier stages of the proceedings, stressing in particular that the judgment failed to carry out a test of discrimination on the basis of the circumstances of the particular case and failed to demonstrate the legitimate objective pursued by the tax measure.

31 The Administrative Court of Appeal dismissed the appeal, essentially repeating the findings of the first instance judgment regarding the interpretation of Article 36(4) and (5) ZPD/04 and, in addition, with regard to the allegation of a violation of the prohibition on discrimination, pointed out that, in the administrative court proceedings, the appellant had not relied on the specific ground of discrimination defined in the ZSD, that – with regard to the direct application of EU law – recital 40 of Regulation No 1288/2013 does not impose any obligations on the legislature as regards the fiscal treatment of mobility support for Erasmus+ students, and, lastly, that the EU Directive governing the rights of students from third countries who are in the EU for the purpose of their studies is not applicable in the appellant's case.

32 The appellant filed a constitutional appeal with the Constitutional Court against the judgment of the Administrative Court of Appeal, claiming that the challenged individual acts violate her right to a fair trial guaranteed by Article 29(1) of the Constitution and Article 6(1) ECHR and the right to respect for property guaranteed by Article 48(1) of the Constitution and Article 1 of Protocol No 1 to the ECHR, in the light of the constitutional guarantee of equality before the law (prohibition of discrimination) contained in Article 14 of the Constitution and Article 14 of the ECHR, and the constitutional guarantee of the legality of individual acts of state administrative bodies contained in Article 19(1) of the Constitution.

33 The appellant also alleges the incorrect or unreasonable application of Article 36(1) and (4) ZPD/04, according to which she lost the right to an increase in the basic allowance for a dependent child because Erasmus+ student mobility support had been paid in excess of the specified limit. She submits that, in her case, the courts should apply Article 36(5) ZPD/04, in respect of which the courts have given specific reasons for considering it inapplicable in her case, having established that 'scholarships' do not fall within the category of benefits pursuant to Article 36(5) ZPD/04 which should be ignored when calculating the limit referred to in Article 36(1) and (4) ZPD/04.

Succinct presentation of the reasoning in the request for a preliminary ruling

34 In the absence of any relevant case-law of the Court (within the meaning of the CILFIT criteria) concerning the allegation of a breach of the prohibition of discrimination or the disproportionate nature of tax measures in relation to the mobility of Erasmus+ students throughout the EU, the Constitutional Court cannot determine whether EU law, and which specific provisions of EU law, are

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applicable in this case. For this reason, the Constitutional Court, which in its case-law already found a violation of Article 141c of the Constitution when the courts failed to apply the applicable EU law when deciding on the constitutional or statutory rights of the appellant, is unable to rule on the alleged violation of Article 141c of the Constitution or on the alleged violations of Article 48(1) of the Constitution and Article 1 of Protocol No 1 to the ECHR (considered alone or in conjunction with Article 14 of the Constitution and Article 14 ECHR) without obtaining a preliminary ruling from the European Court of Justice.

A) CONTENTIOUS ISSUES CONCERNING THE APPLICATION OF ARTICLES 18, 20 and 21 TFEU

1. Do Articles 18, 20 and 21 TFEU and related secondary legislation apply to the appellant?

35 In the present case, it is undisputed that the appellant's child benefited from subjective rights granted directly by EU law, namely:

– the right, under national measures implementing Regulation No 1288/2013, to benefit from student mobility by going to study in Finland and to receive support from Erasmus+ funding in the amount set out in the Erasmus+ agreement in accordance with the criteria of the National Executive Agency as previously established by the Commission in implementing Article 18(7) of the said regulation,

– but also the right of an EU citizen to move and reside freely in another Member State for the purpose of education under Articles 20(2)(a) and 21(1) TFEU and Article 7(1)(c) of Directive 2004/38.

36 In Cases C-523/11, C-585/11, C-275/12 and C-359/13, the Court accepted that, as regards obstacles imposed by national law to access to education in another Member State, pupils and students may also rely on Articles 20 and 21 TFEU in claims against the State of which they are nationals and in which they have their domicile or habitual residence. In addition, in Case C-75/11, which concerned reduced transport fares for students in Austria, it was established that students may rely on the principle of non-discrimination in Article 18 TFEU when exercising the rights guaranteed by Article 21 TFEU (see judgment of 4 October 2012, *Commission* v *Austria*, C-75/11, EU:C:2012:605, paragraphs 36-41).

37 On the other hand, the appellant, who claims that the courts violated their obligation to apply EU law directly and to protect subjective rights arising therefrom under Article 141c of the Constitution, did not personally benefit from the said fundamental rights of students, nor was the tax measure at issue, obliging her to pay the amount of the tax liability, adopted 'in implementation' of EU legislation, such as Regulation No 1288/2013. She also does not fall within the scope of Directive 2004/38, in accordance with Articles 2(2) and 3(1), as she is not a family member accompanying a student while studying in another Member

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State (judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraphs 30-43).

38 However, the appellant does not dispute this at all. She claims to have 'been penalised' by the fact that her child exercised the right of student mobility that she enjoyed under the Erasmus+ agreement implementing Regulation No 1288/2013, or the fundamental right to move and reside in another Member State for the purpose of education under Articles 20(2)(a) and 21(1) TFEU and Article 7(1)(c) of Directive 2004/38. She therefore believes that she has been discriminated against under Article 18 TFEU on account of the aforementioned status conferred on her child by EU law.

39 Consequently, whether the appellant can rely directly on the aforementioned provisions of EU law is a moot point, and the circumstances of the case may indicate a purely internal situation not falling within the scope of the FEU Treaty.

40 However, such an interpretation in a situation such as the present one could lead to a patently unreasonable result, as it may exclude (circumvent) the jurisdiction of the Court of Justice in relation to a number of national measures which might constitute obstacles to the exercise of the fundamental freedoms guaranteed by the FEU Treaty or impede the implementation of EU regulations simply because the obstacle in question is regulated by national law in such a way that it does not technically directly concern an individual who can rely on the direct effect of provisions of primary and secondary EU law, but a member of that individual's family, whose legal position is assigned the factual and legal effects of the exercise of subjective rights guaranteed by EU law (Opinion of 27 January 2005, *Schempp*, C-403/03, EU:C:2005:62, point 15).

41 The above can best be seen in the appellant's case here: if a particular tax measure required her dependent child to pay tax on Erasmus+ student mobility support, or if she lost her right to any tax allowance by virtue of receiving that support, the student would be able to invoke the direct effect of Articles 20(2)(a) and 21(1) TFEU in tax and administrative court proceedings. However, if such a measure does not directly affect the student, but his or her parent, who is obliged to support the student and to bear the cost of his or her studies in another Member State, that parent would not be able to rely on the direct effect of the said provisions, as the rights and freedoms guaranteed by these articles do not apply to him or her personally (he or she has not personally exercised them nor have they been personally granted to him or her by EU law).

42 As the student is not a party to the tax proceedings in the present case (the obligation to pay tax is not his), he does not have the legal standing to bring an action before the administrative court, which could then, using the mechanism established by Article 267 TFEU, request the Court of Justice to give him a useful answer to the question of whether the tax provision at issue constitutes an obstacle to the right to freedom of movement contrary to Articles 20 and 21 TFEU.

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43 The tax treatment of the appellant is inseparably linked with the tax treatment of her dependent child with regard to student mobility under the Erasmus+ programme. Article 10(20) ZDP/04 states that non-refundable grants from EU programmes to promote mobility are non-taxable student income, and payment of such grants does not impose a tax obligation on the student in question. However, as these non-taxable receipts are not covered by an explicit statutory exemption under Article 36(5) ZPD/04, they are, by virtue of Article 36(1) and (4) ZPD/04, taken into account when determining the parent's right to an increased basic allowance for a dependent student and lead to the loss of this right if they exceed a certain fixed limit (in this case, HRK 11 000.00).

44 The right to financial support for student mobility under the Erasmus+ programme does not stand alone in relation to the student's right to mobility and the exercise of the fundamental right to freedom of movement of persons for the purpose of education, as Articles 3.11 and 9 of the Erasmus+ agreement and the attached university documents provide for an obligation to repay that support if the student no longer exercises that mobility (see, similarly, Opinion of 26 January 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:50, point 14).

45 Consequently, the national provision on which the tax measure at issue is based already establishes a direct link with the origin of the non-repayable funds from EU programmes and the objectives of the FEU Treaty, such as student mobility (Article 165(2), second indent), and the purpose of the payment of student mobility support under the Erasmus+ programme was to create a cross-border situation allowing a student to go and study in another Member State of the European Union. This support is therefore, de facto and de jure, inseparable from the right of EU citizens to move freely for the purposes of their education and therefore should not be subject to restrictions on fundamental freedoms (Opinion of 27 January 2005, *Schempp*, C-403/03, EU:C:2005:62, points 18 and 20).

46 The conclusion that the appellant can rely on Articles 20 and 21 TFEU is also supported by the objection raised by the appellant on the basis of Article 18 TFEU. As the Court has already granted students the right to invoke discrimination under Article 18 TFEU when exercising the rights guaranteed by Articles 20 and 21 TFEU and Directive 2004/38 (judgment of 4 October 2012, *Commission* v *Austria*, C-75/11, EU:C:2012:605), and guided by the concept of discrimination by association adopted in the Court's case-law (Opinion of 12 March 2015; Judgment of the Court (Grand Chamber) of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480), it seems that the appellant could directly invoke Article 18 TFEU, which applies whenever the case falls within the substantive scope of the FEU Treaty, in claiming that the tax measure placed her in a less favourable position because of her child's special status under EU law, that is, because she enjoys rights directly granted to her child by national acts implementing Regulation No 1288/2013 and by Articles 20(2)(a) and 21(1) TFEU and Article 7(1)(c) of Directive 2004/38.

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47 Since Case C-75/11, however, the Court has slightly changed this approach. In its judgment of 2 June 2016, *Commission* v *Netherlands* (C-233/14, EU:C:2016:396, paragraphs 88 to 94), which dealt with a similar issue of the right of 'mobile' students to have their transport costs covered, the Court held that these costs are 'scholarships' in the broader sense of the word, from which application of the principle of equal treatment is excluded by virtue of Article 24(2) of Directive 2004/38.

48 However, given that the purpose of Article 24(2) of Directive 2004/38 was to exempt Member States from the obligation to grant foreign students the same entitlement to social assistance or grants as to their nationals, which is additional to the condition set out in Article 7(1)(c) of that Directive requiring that the student have sufficient resources not to become a burden on the social security system of the host Member State during their stay, it would appear that Article 24(2) of the Directive is applicable to Erasmus+ student mobility support paid from the EU budget, whose very purpose was to eliminate the restrictions on student mobility referred to in the Directive by paying Erasmus+ students a certain amount of money before the start of their stay in another Member State, thereby indirectly relieving the burden on the social security system of that Member State.

49 Accordingly, Regulation No 1288/2013 does not even apply the concept of 'scholarship'. Article 27(12) mentions EU funds for 'grant support'. Member States have very narrow powers over Erasmus+ support, as it is paid from funds transferred by the Commission to be managed by the National Agency, which, in doing so, is bound by the Commission's existing rules on the amount of monthly support or the obligation to reimburse it. The latter issue is therefore not governed by national law, but directly by a Commission regulation and rules which are binding on the national agency.

50 Accordingly, it would appear that Articles 20 and 21 TFEU could apply in the appellant's case, either alone or in conjunction with Article 18 TFEU.

2. Is there an obstacle to the right to freedom of movement (student mobility) within the meaning of Articles 20 and 21 TFEU?

51 The Court argues that although direct taxation falls within the competence of Member States, they must exercise that competence consistently with EU law. Such competence does not allow them to apply measures that conflict with the freedoms of movement guaranteed under the TFEU, including tax measures which would discourage individuals from exercising their fundamental rights guaranteed under the FEU Treaty (judgments of 24 October 2019, *Belgian State*, C-35/19, EU:C:2019:894, paragraphs 31 and 34, and of 1 December 2011, *Commission* v *Hungary*, C-253/09, EU:C:2011:795, paragraph 42). These measures may constitute an obstacle to the right to free movement even if they are formulated in an apparently neutral way, independent of the nationality of the person concerned

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(judgment of 9 November 2006, *Turpeinen*, C-520/04, EU:C:2006:703, paragraph 15).

52 The Court has already ruled that national tax legislation which denies an EU citizen the right to deduct tax on the ground that he or she has exercised his or her right to freedom of movement constitutes a measure restricting the right to freedom of movement under Article 21 TFEU (judgment of 26 May 2016, *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 44).

53 In the context of student mobility, it has been established that if a Member State regulates its system for assisting education in such a way that students studying in a different Member State become entitled to that assistance, it is obliged to ensure that the system for awarding such assistance does not constitute an unreasonable restriction on the right of movement and of establishment in the territory of a Member State enshrined in Article 21 TFEU (judgments of 18 July 2013, *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 30, and of 24 October 2013, *Elrick*, C-275/12, EU:C:2013:684, paragraph 25) and may not, by virtue of provisions creating additional obstacles or costs associated with leaving countries of origin, discourage people from leaving their country of origin to pursue studies in another Member State (judgment of 23 October 2007, *Morgan and Bucher*, C-11/06 and C-12/06, EU:C:2007:626, paragraph 30). This finding is based on the fact that mobility in education and training is an integral part of freedom of movement of persons and one of the main objectives of the European Union's action based on the second indent of Article 165(2) TFEU (judgment of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 71).

54 In this case, the appellant's child was evidently not dissuaded from benefiting from the Erasmus+ student mobility resources and the rights laid down in Articles 20 and 21 TFEU, as the disputed tax treatment could be foreseen neither by the appellant, who was supporting him in accordance with Article 64 of the Constitution and Article 290(1) of the Obiteljski zakon (Family law), nor by the student himself before he went to Finland to study.

55 However, it would appear that, according to the Court's case-law, that circumstance could nevertheless be irrelevant to determining whether or not an obstacle exists to the right of free movement and residence in another Member State under Articles 20 and 21. Indeed, the Court stated in its judgment of 26 February 2015, *Martens* (C-359/13, EU:C:2015:118, paragraphs 26, 32), that 'it is, in that regard, irrelevant that considerable time has elapsed since the appellant […] exercised her free movement rights'. In this case, too, time had elapsed since the right to freedom of movement had been exercised and the obstacle to that right had been imposed by the mere fact of exercising it.

3. Is there unequal (less favourable) treatment in comparable situations – possible ways of applying the principle of equality (prohibition of discrimination) in the present case?

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56 As to the premiss that exercising the rights guaranteed by Articles 20 and 21 TFEU has placed the taxpayer in a less favourable situation, there are difficulties in finding a comparable group (benchmark) against which to compare the appellant's situation.

57 The appellant first argues that she was discriminated against in relation to 'other employed persons' and then that she was discriminated against in relation to taxpayers in Croatia whose dependent children studied under the Erasmus+ programme in the group 3 countries with lower average costs of living, as defined by the Commission, as in that case she would not have lost the right to the disputed allowance on the ground that the advance student mobility payment would not have exceeded the limit laid down in Article 36(1) and (4) ZPD/04.

58 This implies that Member States would, through such tax legislation, promote student mobility only to countries participating in the Erasmus+ programme where the average cost of living is lower, that is to say, where the tax treatment (total cost of going to study) would be more favourable. In the case of students whose educational costs are being paid by parents who are supporting them, such a tax provision might restrict not only the right of students to leave their country of residence for educational purposes, but also the mobility of students within the EU to certain Member States. This may run counter to the recommended neutrality of Erasmus+ measures in relation to the different education systems in the Member States referred to in Article 18(7) of Regulation No 1288/2013.

59 However, it would not appear that the appellant's situation is comparable to that of income taxpayers in Croatia whose children have studied in Erasmus+ countries with lower average costs of living, at least not in the way formulated in the complaint.

60 Indeed, if we accepted the argument that, for the purposes of assessing a breach of the principle of non-discrimination, the appellant would have to be compared with tax residents whose children studied in Erasmus+ countries with a lower average cost of living, we would be overlooking an essential element of the appellant's allegedly less favourable treatment, namely the fact that her child studied in Finland, where the cost of living is higher than in Croatia, where the appellant earns an income to support her child. Moreover, the claim of exclusion from the limit laid down in Article 36(1) and (4) ZPD/04 would not be correct if the ancillary circumstances of the case were even slightly different (for example, if the advance payment and the remainder of that support had been paid in a single tax year, even if in instalments). Therefore, such a point of reference would only relate to ancillary aspects of the case that are unrelated to the substance of the allegations raised, and would not involve objective, easily identifiable elements (ECtHR Advisory Opinion, §§ 68-69; Opinion of 26 January 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:50, point 105).

61 Next, we have to accept the conclusion of the courts that the appellant cannot be compared to the parent of a child receiving social assistance within the meaning of

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Article 36(5) ZPD/04, which does not cause that taxpayer to lose the right to an increased basic allowance for a dependent child. Social assistance is, in the context of national law, paid to persons from vulnerable groups, for example on the basis of their financial situation or disability. Mobility support from the Erasmus+ programme, from which the appellant's child benefited, is available to all students, regardless of their financial situation or that of their parents.

62 Furthermore, it is a fact that where the payment of any of the non-taxable benefits set out in Article 10 ZPD/04 exceeds the limit set out in Article 36(1) and (4) ZPD/04, the right to increase the basic allowance for the dependent family member is lost. This could indicate that there is in fact no unequal treatment in comparable situations on the basis of rights under EU law, since the fiscal treatment of Erasmus+ student mobility support in this sense is the same as for the income of any other dependent family member.

63 However, there is an element of doubt here because, as the appellant points out, none of the non-taxable receipts referred to in Article 10 ZPD/04 has the specific purpose of encouraging student mobility within the EU, which is one of the main objectives of the EU's action under the second indent of Article 165(2) TFEU, nor do they constitute a measure implementing Regulation No 1288/2013, the primary objective of which is to create a cross-border situation and enable the free movement of people for educational purposes in accordance with Articles 20(2)(a) and 21(1) TFEU and Article 7(1)(c) of Directive 2004/38.

64 For this reason, national grants or other forms of funding for students and pupils, which are awarded irrespective of where the student will study and for various purposes, as well as other non-repayable (or repayable) funds granted from the EU budget that are disbursed in the Member State of the final beneficiary and are not aimed at exercising the fundamental right of free movement of EU citizens guaranteed by the TFEU are different from Erasmus+ student mobility support.

65 It therefore appears that the appellant is not in a situation comparable to any income tax payer in Croatia, but is actually in a different situation from all others.

66 It appears that, in this case, the test of discrimination is not whether the appellant's right to be treated in the same way as other persons in a comparable situation has been infringed, but whether the requirement that the State treats persons whose situation is substantially different in a different way has been infringed.

67 In other words, the fundamental question which the test of discrimination should answer in this case is whether the tax provision, by virtue of the specific status of the appellant's dependent children conferred by EU law, should treat the appellant differently from income tax payers in Croatia whose dependent children have not benefited from the right of students to mobility within the EU.

68 In order to assess whether the appellant was placed in a less favourable situation in relation to the indicated comparable group, it is necessary to address her allegations concerning the direction of mobility from Croatia to Finland, which

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the Commission classified as a group 1 Erasmus+ country, with a higher average cost of living. According to the Commission's Erasmus+ programme guidelines of 2014, 2015 and 2017, Croatia was classified in the group of participating countries with an average cost of living at the time of the mobility in Finland of the appellant's child. It was only in 2017 that the European Commission classified Croatia as a participating country with a lower average cost of living.

69 And while it might appear that the appellant is alleging less favourable treatment on the basis of a de facto difference, the Constitutional Court notes that this 'de facto difference' is codified as a legal norm in Article 18(7) of Regulation No 1288/2013. In implementing this provision, on the basis of Article 36(3) of the Regulation, the Commission has drawn up a formula to calculate the monthly mobility support for students depending on the average cost of living and the direction of mobility between countries classified in each of the three groups. The ranges introduced for these groups, on the basis of which the amount of support for the appellant's child was determined, in comparison with the ranges which the Commission established for socially disadvantaged groups, clearly do not reflect the real costs of student mobility.

70 Therefore, it should perhaps be assumed that parents of dependent students benefiting from mobility and moving from a Member State with lower or middle average living costs to one with higher average living costs, as in the appellant's case, are at a particular disadvantage in terms of their child's living costs not only in comparison with parents whose children did not benefit from Erasmus+ funding and remained to study at home, thereby avoiding mobility costs, but also in comparison with parents whose dependent children benefited from Erasmus+ funding within the same group of countries, defined for the purposes of the programme, with a comparable cost of living, and especially in comparison with those parents whose children benefited from mobility by going from a country with a higher or average cost of living to a country with a lower average cost of living.

71 For the above reasons, the seemingly neutral provisions of Article 36(1) and (4) ZPD/04 appear to place the appellant in a less favourable position compared to taxpayers in Croatia whose dependent children have received other non-taxable income, as referred to in Article 10 ZPD/04, in excess of the limit laid down in Article 36(1) and (4) ZPD/04, and have not benefited from Erasmus+ student mobility measures in Member States with a higher average cost of living, as determined by the Commission in accordance with Article 18(7) of Regulation No 1288/2013.

4. Can the placing of the appellant in a less favourable position be justified by a particular reasonable objective?

72 Decisions by public authorities obliging the payment of tax constitute measures to control the use of property with the legitimate aim of ensuring the payment of taxes (Article 51(1) of the Constitution, Article 1(2) of Protocol No 1 to the

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ECHR), and Member States have broad discretion as to the means they choose to achieve this objective.

73 The tax decision at issue does not implement a social policy measure that benefits the appellant, but deprives her of the right to the allowance set out in Article 36(2) ZPD/04, guaranteed to all child-supporting taxpayers, which reflects the constitutional principle of equality and fairness of the tax system and has the legitimate aim of correcting the social and material inequalities in average income and expenditure between taxpayers who have dependent children and those who do not (judgment of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 57).

74 Therefore, the Constitutional Court must admit that the provisions of Article 36(1) and (4) ZPD/04 have a generally legitimate purpose in that the legislature, in accordance with the principle of sound management of limited public resources, does not grant the right to increase the basic allowance for a dependent child to taxpayers whose dependent children receive a certain amount of income in the tax year, which, in the legislature's view, results in the child being able to contribute to his or her maintenance from his or her own income and reduce his or her parents' expenses, unlike taxpayers whose children receive little or no income and who are therefore supported solely by their parents' income.

5. Was the tax measure at issue necessary to achieve that legitimate aim and is it justified (proportionate) from the point of view of EU law?

75 National legislation which restricts the right to freedom of movement for the purpose of education laid down in Article 21 TFEU, by making it more difficult to achieve the objective of promoting student mobility referred to in the second indent of Article 165(2) TFEU, or which 'penalises' an EU citizen for exercising that right can only be justified if it is based on objective considerations of public interest unrelated to the nationality of the persons concerned and if it is proportionate in relation to the legitimate aim pursued by that legislation, and must therefore be suitable for attaining the legitimate aim pursued and not go beyond what is necessary to achieve that aim.

76 With regard to the national legislation governing tax allowances in the country of tax residence, the principle has been adopted that it is incumbent on the Member State of residence, as the centre of a taxpayer's personal and property interests, to grant tax benefits, exemptions or allowances related to the taxpayer's personal or family situation, as that State is in the best position to assess the taxpayer's ability to pay tax, taking into account all of his or her income and his or her personal and family situation. Irrespective of this, however, tax provisions that constitute a restriction of the right to free movement can only be justified under the same conditions of proportionality already indicated above (judgment of 15 July 2021, *Belgian State (Loss of tax advantages in Member State of residence)*, C-241/20, EU:C:2021:605, paragraphs 25 to 27 and 33).

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77 It has already been held that Article 36(1) and (4) ZPD/04 constituted an obstacle to the use of mobility measures under the Erasmus+ programme, that is to say, to leaving the Member State of residence to go and study in another Member State, and for that reason alone deprived the appellant of her tax allowance for a dependent student and made her liable to pay tax, irrespective of the fact that the student had taken up residence for the purposes of education in a Member State which, on the basis of Article 18(7) of Regulation No 1288/2013, was classified as a participating country with a higher average cost of living. It follows that those provisions are not tax-neutral with regard to a dependent student's right to decide to leave his or her country of residence to study in another Member State or with regard to the free choice of the country of residence (host country) for the purpose of study, in view of the direction of mobility of students within the European Union between the different groups of countries participating in the Erasmus+ programme, as determined by the Commission. Therefore, the first condition – the absence of less favourable treatment on the basis of nationality – does not appear to have been met (judgment of 23 October 2007, *Morgan and Bucher*, C-11/06 and C-12/06, EU:C:2007:626, paragraphs 38 and 41).

78 The application of Article 36(1) and (4) ZPD/04 is appropriate to achieving the legitimate aim indicated above, but the question is whether it is necessary to achieve that aim in this particular case.

79 Article 36(1) and (4) ZPD/04 sets a limit that the non-taxable receipts must not exceed if a parent is not to lose their allowance for a dependent child, without allowing verification of his or her personal and family situation. Furthermore, it excludes the possibility of setting that limit in accordance with the appellant's recognised entitlement to the higher basic allowance referred to in Article 54 ZPD/04, which applies to residents of group II-assisted areas of Croatia. It is thus based on a fixed criterion that does not make an allowance for differences between different categories of taxpayer, which is contrary to the legitimate purpose of Article 36(2) ZPD/04, whereby entitlement to the allowance for a dependent child is granted in order to correct social and financial inequality among taxpayers.

80 The fixed limit in Article 36(1) and (4) ZPD/04 also makes it impossible to take into account the direction of mobility of a dependent student, that is, the fact that the appellant's child benefited from a mobility measure in an Erasmus+ participating country with a higher average cost of living than Croatia, where she normally resides and studies.

81 Notwithstanding the fact that the Erasmus+ student mobility support, determined in accordance with the rules of the Erasmus+ programme, cannot cover the actual costs of a Croatian student's study trip to Finland, taxpayers in Croatia whose children have chosen to benefit from a mobility measure in a country with a higher average cost of living lose the right to their allowance for a dependent child in spite of the fact that they clearly have to incur higher expenses for the child's

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upkeep than if the child had stayed in Croatia to study. This may indicate that the tax burden imposed is disproportionate.

82 There is therefore doubt as to whether the tax measure at issue is necessary to achieve the legitimate purpose pursued by national law of not granting the allowance in question to parents of dependent children who have earned their own non-taxable income, where that income has reduced the parents' expenses (relieved their obligations) in relation to the child's maintenance.

83 Juxtaposing the importance of that legitimate objective and the objective of promoting student mobility referred to in the second indent of Article 165(2) TFEU, it should be noted that, despite the specific qualification of support for student mobility from the Erasmus+ programme in Article 10(20) ZPD/04, which refers to the legitimate purpose of mobility for the purpose of education under the second indent of Article 165(2) TFEU, Article 36(1) and (4) ZPD/04 does not allow that support to be treated differently from any other receipts with regard to allowances for a dependent student.

84 Also from the point of view of the second indent of Article 165(2) TFEU, it seems questionable whether the tax measure at issue would have been necessary if the tax authorities, before denying the right to an allowance for a dependent student benefiting from a mobility measure under the Erasmus+ programme in a country with a higher average cost of living, had withheld advance income tax as in previous tax years, assuming that the appellant enjoyed the right to increase her basic allowance for her child as if he had studied in Croatia, where the costs of study and the average cost of living are lower than in Finland.

85 The appellant's arguments regarding the disproportionate nature of the tax measure at issue appear to be supported by the decisions of the Vlada (Government) and the Hrvatski sabor (Croatian Parliament) to exclude student mobility support under the Erasmus+ programme in ZPD/16 from the income limit for a dependent child. The Government justified this on the grounds of obstacles to mobility, which disproportionately affected students from vulnerable groups, and of achieving the objective of making better use of mobility programmes for education in the European Union.

86 However, what is at issue in the appellant's case is the fact, correctly argued by the courts, that the courts were unable apply the ZPD/16 retroactively to her obligation to pay income tax and the local income tax supplement for 2014.

87 Although the Constitutional Court has in certain specific cases interpreted the case-law as meaning that courts can and should apply a new law retroactively if the infringement of constitutional rights and freedoms can be remedied by the application of a law more favourable to the appellant, the present case is not similar to those cases.

88 Indeed, an obligation to apply a new provision retroactively would jeopardise the fundamental principles of the national tax system which are undoubtedly also

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inherent in the tax systems of other Member States, namely that the tax rules in force when the tax-relevant circumstances arose are to be applied in order to determine the tax liability and that the tax liability is determined and the tax due is calculated for tax periods representing one calendar year.

89 Given that the appellant's rights guaranteed by Article 48(1) of the Constitution and Article 1 of Protocol No 1 to the ECHR cannot be protected by retroactive application of a tax provision, such a result, given that all of the allegations concerning the disproportionate nature of the tax measure at issue are in any event based on the interpretation, intention and objectives of EU law, could only be achieved by a preliminary ruling of the Court, on the basis of which the national court would be obliged to disapply the provisions of Article 36(1) and (4) ZPD/04, on which the tax measure at issue is based.

90 For the above reasons, the Constitutional Court is asking the first question referred for a preliminary ruling – to which the Court of Justice can provide a useful answer – on the substance of the appellant's allegations of violations of Articles 14 and 48(1) of the Constitution in connection with the application of EU law.

B) DISPUTED ISSUES CONCERNING THE POSSIBLE APPLICATION OF REGULATION NO 883/2004

91 Since the appellant is challenging the loss of the tax allowance for a dependent child who was resident in another Member State, her case in principle falls within the substantive scope of Regulation No 883/2004.

92 The judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)* (C-328/20, EU:C:2022:468), however, concerned tax benefits for dependent children of migrant workers employed in Austria whose children reside in other Member States. In the present case, the situation is reversed, as the dependent child exercised the right to move and reside freely in another Member State, while the appellant has not made use of her right of free movement under Article 21 or 45 TFEU.

93 Furthermore, it appears that in the judgment of 13 October 2022, *Finanzamt Österreich (Recovery of family benefits)* (C-199/21, EU:C:2022:789, paragraphs 33 to 38), which concerned tax credits for a child who had studied in another Member State, the Court took the view that, for the purposes of applying Article 67 of Regulation No 883/2004, whether the individual who invokes its application has previously exercised his or her right to free movement is not decisive: the decisive factor is that the right to a family benefit, if not previously exercised, may be granted in accordance with the legislation of the Member State which is responsible for paying it. In the present case, the appellant did exercise that right in previous tax periods and it can still be granted for the 2014 tax year if EU law requires that Article 36(1) and (4) ZPD/04 be waived.

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94 However, it would also appear that exercise of the right to a family benefit referred to in the judgment in the previous paragraph of the present request depends on whether the person who invokes the application of Regulation No 883/2004 receives a pension from the two competent Member States. In the present case – which deals with the payment of student mobility support under the Erasmus+ programme – even though that support is disbursed in the Member State of study, in accordance with the Commission's criteria it is paid only in the dependent student's country of origin, where his or her parent also resides. Similarly, the appellant derives her own taxable receipts exclusively in Croatia.

95 It should also be noted that Article 2 of Regulation No 883/2004, which regulates 'persons covered' by the Regulation, does not contain the condition of residence in a Member State different from the country of origin or prior exercise of the right of free movement. It only states that it applies 'to nationals of a Member State […] who are or have been subject to the legislation of one or more Member States, as well as to the members of their families […]'. The definition of 'activity as an employed person' in Article 1(a) of Regulation No 883/2004 does not place conditions on the place of activity as an employed person either, merely stating that 'activity as an employed person' means 'any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists'.

96 The appellant is therefore a person who is active as an employed person within the meaning of Article 1(a) of Regulation No 883/2004, who has exercised the right to a tax allowance for a dependent child, which is a family benefit within the meaning of Article 1(z) of that regulation, who is subject to the legislation of at least one Member State within the meaning of Article 2 of that regulation, and who is claiming her right to a tax allowance for a dependent family member which was denied to her because of the payment of support for residing in another Member State within the meaning of Article 67 of that Regulation.

97 Those provisions may therefore be sufficiently open-ended for the appellant's case to fall within the scope of Regulation No 883/2004 and Article 67 of the regulation may be interpreted as meaning that the appellant should also be granted a tax allowance for a child who has benefited from Erasmus+ programme mobility measures and has taken up residence in another Member State for educational purposes as if she had not benefited from those measures.

98 If such an interpretation were accepted, it would neutralise the whole test of proportionality (and discriminatory result) of an obstacle to the right to free movement of Erasmus+ students under Articles 18, 20 and 21 TFEU, as previously argued, as it would ensure that nobody is penalised with regard to the granting of family benefits merely because he or she or a family member has exercised the right to move freely guaranteed by the FEU Treaty. This would bring the scope of Regulation No 883/2004 in line with the scope and objectives of the FEU Treaty.

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99 It should also be noted that the regulations on the coordination of social security systems also apply to students as persons insured in at least one Member State. If it were to be held that Article 2 of Regulation No 883/2004 applies only to persons who have previously exercised some freedom of movement guaranteed by the FEU Treaty, then the appellant's child is a person covered by the regulation within the meaning of that article, and the appellant could be covered by the regulation as a family member of a person who has exercised that right.

100 In this regard, it may be noted that as early as the judgment of 16 July 1992, *Hughes* v *Chief Adjudication Officer* (C-78/91, EU:C:1992:331, paragraphs 25 to 28), it was held that the family member of a person who has exercised his or her right of free movement may invoke the protection of family benefits in his or her country of residence in accordance with Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security systems to paid workers and their families moving within the Community (OJ 1971 L 149, p. 1), the predecessor of Regulation No 883/2004, even though the family member had not personally exercised his or her right of free movement and was habitually resident in the Member State of his or her nationality.

101 However, the issue in the present case is whether the appellant, as such a family member, is not entitled, as indicated in the aforementioned *Hughes* judgment, to a 'derived right' to family benefits based on the right to a family benefit of a dependent student as a person who has exercised the right of free movement. The only way to establish such a 'derived right' is to take into account that, according to Article 10(20) ZPD/04, mobility support from the Erasmus+ programme is not taxable in the case of a dependent student who has exercised the right to free movement, and should therefore remain tax-neutral for the parent of the dependent student as well, and that therefore the applicability of Article 36(1) and (4) ZPD/04 should be waived in respect of the appellant, with regard to the dependent student's allowance.

102 At the same time, it also appears that the meaning of the provision of Article 67 of Regulation No 883/2004 does not require that certain rights to family benefits be granted to an individual as rights 'derived' from some other rights granted to him or her or to a family member while he or she is exercising some freedom of movement, but that the provision in fact contains a 'negative' right to respect his or her acquired rights, as if neither he or she nor a family member had exercised the right to free movement guaranteed by the FEU Treaty.

103 Accordingly, in the event that the Court concludes that Regulation 883/2004 is applicable in the present case, even though the Constitutional Court has doubts in this regard, a second question has been referred for a preliminary ruling.

104 For the purpose of ruling on the request for a preliminary ruling, copies of the files of the Osijek Administrative Court and the Constitutional Court were submitted in the annex to the request.

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