Case C-142/24

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

Date lodged:

23 February 2024

Referring court:

Finanzgericht Köln (Germany)

Date of the decision to refer:

30 November 2023

Applicant:

Familienstiftung

Defendant:

Finanzamt Köln-West

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Subject matter of the main proceedings

Interpretation of Article 40 of the EEA Agreement as regards the taxation of the *inter vivos* transfer of assets to a foreign foundation

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU, in particular the

Agreement on the European Economic Area (‘the EEA Agreement’)

Question referred for a preliminary ruling

Must Article 40 of the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992 be interpreted as precluding a Member State’s national legislation on the levying of inheritance and gift tax which applies the highest tax class (III) for the taxation of an *inter vivos* transfer of assets to a foundation established abroad even where the foundation is established essentially in the interests of a family or certain families (family foundation), whereas for a family foundation established on national territory in an equivalent situation, the tax class depends on the relationship between the most distantly related beneficial owner under the foundation's articles of association and the donor (founder), which results, for family foundations established on national territory, in the application of the more favourable tax classes I or II.

Provisions of European Union law relied on

TFEU, in particular the second paragraph of Article 267 and Articles 63, 65(1)(a) and 65(3)

Agreement on the European Economic Area, in particular Articles 1(2), 6 and 40 and Annex XII

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) ('Directive 88/361'), in particular heading XI of Annex I

Provisions of national law relied on

Gesetz zu dem Abkommen vom 17. November 2011 zwischen der Bundesrepublik Deutschland und dem Fürstentum Liechtenstein zur Vermeidung der Doppelbesteuerung und der Steuerverkürzung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen vom 5. Dezember 2012 (Law of 5 December 2012 on the Agreement of 17 November 2011 between the Federal Republic of Germany and the Principality of Liechtenstein for the avoidance of double taxation and fiscal evasion with respect to taxes on income and on assets)

Abkommen vom 17. November 2011 zwischen der Bundesrepublik Deutschland und dem Fürstentum Liechtenstein zur Vermeidung der Doppelbesteuerung und der Steuerverkürzung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen (Agreement of 17 November 2011 between the Federal Republic of Germany and the Principality of Liechtenstein for the avoidance of double taxation and fiscal evasion with respect to taxes on income and on assets, 'the Liechtenstein Double Taxation Agreement'), in particular Articles 2, 3(1) and 24(6)

Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance tax and gift tax, 'the ErbStG') as amended by the Gesetz zur Umsetzung der Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften (Law transposing the Mutual Assistance Recovery Directive and amending taxation provisions) of 7 December 2011, in particular Paragraphs 1(1)(2), Paragraph 7(1)(8), Paragraph 10(1), Paragraph 15(1)(2) and (1)(3), the first sentence of Paragraph 15(2), Paragraph 16(1)(3) and (1)(7) and Paragraph 19(1)

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is a family foundation having legal capacity with its registered office and central administration in Z, Principality of Liechtenstein. It was established by the founder in Liechtenstein, under Liechtenstein law, in 2014.

2 The founder lives in Germany and was also resident in Germany at the time when the foundation was established. Under its articles of association, the purpose of the foundation is to sponsor and support the children of the founder and her late husband. The beneficiaries of the foundation are the founder, the founder's children and their children.

3 In the course of establishing the foundation, the founder provided the applicant with an endowment fund. Under the relevant provisions in the foundation's articles of association, the applicant was free to dispose of the assets transferred to it. The founder, in contrast, no longer had a right to dispose of the assets. She also had no option of demanding that the assets be retransferred in whole or in part. The applicant was therefore not subject to any instructions whatsoever from the founder.

4 In a letter dated 16 April 2015, the applicant notified the defendant Finanzamt (tax authority) of the transaction and submitted a tax return in relation to gift tax. She argued that the foundation had been established essentially in the interests of the founder's family and therefore, under Paragraph 15(2) of the ErbStG, taxation should be based on the relationship between the most distantly related beneficial owner under the articles of association and the founder (what is known as 'tax-class privilege').

5 She submitted that the reservation regarding tax-class privilege provided for in the first sentence of Article 15(2) of the ErbStG, that the family foundation must be established 'on national territory', was irrelevant on the grounds of unjustifiable infringement of the free movement of capital within the meaning of Article 40 of the EEA Agreement. The applicant asserted that tax class I applied to the founder's children under Paragraph 15(1)(2) and (1)(3) of the ErbStG. The applicable tax rate was, she argued, 19% in accordance with Paragraph 19(1) of the ErbStG.

6 In its assessment dated 22 November 2018, the defendant Finanzamt set gift tax in relation to […] 2014 at EUR […]. In so doing, it did not take into account the relationship between the beneficiaries and the founder and based its assessment on taxable acquisition (Paragraph 10(1) of the ErbStG) amounting to EUR […]. It applied tax class III and so deducted from the value of the acquisition of EUR […] only a tax-free allowance of EUR […] (Paragraph 16(1)(7) of the ErbStG) and applied a tax rate of 30% (Paragraph 19(1) of the ErbStG).

7 The applicant filed an objection to that assessment on 19 December 2018. The defendant Finanzamt rejected the objection as unfounded by decision of 6 January 2021.

8 The applicant is continuing, by its action brought on 5 February 2021, to pursue its claim to have the tax-class privilege which is enshrined in the first sentence of Paragraph 15(2) of the ErbStG applied to it directly. It bases its action in particular on the argument that there is an unjustified restriction in place on the free movement of capital.

9 The defendant Finanzamt contests the action.

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

10 Reference to the Court of Justice of the European Union (‘the Court’) for a preliminary ruling is required under the second paragraph of Article 267 TFEU because understanding of the free movement of capital (Article 40 of the EEA Agreement) is in doubt in the present dispute and the decision depends on the answer to the question referred.

11 The referring court considers that the Court has jurisdiction, since the EEA Agreement forms an integral part of the EU legal system and the dispute relates to taxation of a transaction between nationals of States which are party to that agreement (see judgment of the Court of 28 October 2010, *Établissements Rimbaud*, C-72/09, EU:C:2010:645, paragraph 19 and the case-law cited).

12 The Chamber has doubts as to whether it is compatible with Article 40 of the EEA Agreement for tax class III, the highest class, always to be applied when a family foundation is established abroad, while the tax class in the equivalent situation for a family foundation on national territory depends on the relationship between the most distantly related beneficial owner under the foundation’s articles of association and the donor (founder), which results, for family foundations established on national territory, in the application of the more favourable tax class I or II.

13 If that preferential application of tax classes for family foundations established on national territory were incompatible with EU law, the present action would be successful, because then the relationship between the beneficiaries of the applicant and the founder would be taken into account.

14 If the applicant could rely directly on Article 40 of the EEA Agreement, taxation of the establishment of the foundation would accordingly have to take into account the tax-class privilege enshrined in the first sentence of Paragraph 15(2) of the ErbStG. As the beneficiaries most distantly related to the founder are her grandchildren, tax would be levied in accordance with tax class I (Paragraph 15(1)(3) of the ErbStG); the taxable acquisition remaining after deduction of the tax-free allowance would be subject to a tax rate of 19% (Paragraph 19 of the ErbStG).

Assessment of the dispute under national law

15 On the basis of national law, the inheritance tax assessment of 22 November 2018 and the decision issued on 6 January 2021 on the objection to it are lawful. As the applicant is a foundation established abroad – in Liechtenstein – the 'tax-class privilege' provided for in the first sentence of Paragraph 15(2) of the ErbStG is not applicable. From that perspective, the action should be dismissed.

16 The applicant's taxable acquisition under Paragraph 7(1)(8) of the ErbStG should be taxed in accordance with Paragraph 115(1) of the ErbStG. Tax classes I or II are not applicable. The first sentence of Article 15(2) of the ErbStG, under which, for foundations established essentially in the interests of a family or certain families (family foundations), the relationship between the most distantly related beneficiary under the foundation's articles of association and the donor (founder) is to be taken into account in determining the tax class, is not applicable in the present case.

17 It is undisputed that the applicant, in terms of its purpose and its articles of association, is a family foundation (see Hessisches Finanzgericht [Finance Court of Hesse], judgment of 7 March 2019, 10 K 541/17, EFG 2019, 930, with further references). Application of the privilege enshrined in the first sentence of Paragraph 15(2) of the ErbStG is ruled out under national law, however, because the applicant, being a Liechtenstein foundation established under Liechtenstein law with its registered office and central administration in Z, was not established on German national territory.

18 When applying national law, no divergent assessment arises from the prohibition of discrimination in Article 24(1) of the Liechtenstein Double Taxation Agreement.

19 The prohibition of discrimination derived from Article 24(1) of the Liechtenstein Double Taxation Agreement, the scope of which extends to legal persons, forbids the less favourable treatment of foreign nationals compared with German citizens in the same circumstances. The prohibition of discrimination must therefore be distinguished from tax differentiation on the basis of residence or between unlimited and limited tax liability, which is in principle permissible. Since Article 24(1) of the Liechtenstein Double Taxation Agreement defines the expression 'in the same circumstances' to the effect that a taxpayer resident in a State and a taxpayer not resident there are not in the same circumstances, taxation provisions which provide for different treatment on the basis of residence do not infringe Article 24(1) of the Liechtenstein Double Taxation Agreement even if this indirectly leads to discrimination against foreign nationals.

20 The prohibition of discrimination does not apply where – as in the present dispute – the German legislature provides for tax advantages for corporations whose central administration or registered office is in Germany while excluding from that advantage corporations which have their registered office and central

administration abroad, no matter under which the law they were established (see Hessisches Finanzgericht, judgment of 7 March 2019, 10 K 541/17, EFG 2019, 930; Bundesfinanzhof [Federal Finance Court] judgment of 3 March 1983, II R 20/80, BStBl II 1984, 9, with further references).

Consideration of the question referred for a preliminary ruling

21 It is possible, however, that the applicant can successfully invoke the free movement of capital guaranteed in the European Economic Area ('the EEA') directly. That follows from Article 40 of the EEA Agreement, read in conjunction with Annex XII to that agreement, and from Articles 63 and 65 TFEU.

22 The fundamental freedoms of free movement of goods, persons, services and capital under the EEA Agreement apply without restriction to EEA members (see Article 1(2) of the EEA Agreement). In addition, Article 6 of the EEA Agreement provides that the agreement be interpreted in conformity with EU law. It is for the Court to ensure that the provisions of the EEA Agreement are interpreted uniformly within the Member States (see Schwenke and Hardt in Wassermeyer, *DBA*, Volume I, looseleaf, as at September 2023, MA Vor 1, paragraph 102, with numerous references to case-law; see also judgments of the Court of 23 September 2003, *Ospelt and Schlössle Weissenberg*, C-452/01, EU:C:2003:493, and of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688).

23 Article 40 of the EEA Agreement stipulates that, within the framework of the provisions of that agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Additionally, Annex XII to the EEA Agreement refers to Directive 88/361.

24 There is no definition of the term 'movement of capital' in the EEA Agreement, in the European Treaties or in Directive 88/361. However, Directive 88/361 is recognised as having indicative value (see judgment of the Court of 28 September 2006, *Commission* v *Netherlands*, C-282/04 and C-283/04, EU:C:2006:608).

25 In Annex I to Directive 88/361, gifts and endowments are specified under heading XI ('Personal capital movements'), which suggests that gifts and endowments should in principle be included within the scope of the protection of free movement of capital (see judgment of the Court of 16 June 2011, *Commission* v *Austria*, C-10/10, EU:C:2011:399 and the case-law cited).

26 Furthermore, the Court has already stated on several occasions that the tax treatment of gifts, whether they are gifts of money, immovable property or movable property, falls within the scope of the free movement of capital. An exception applies only to cases where the constituent elements of the transactions concerned are confined within a single Member State (see judgment of the Court

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of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216). It includes the initial contribution of the assets to the foundation on its being set up by the founder (see judgment of the Court of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt*, C-589/13, EU:C:2015:612).

27 Since the Principality of Liechtenstein is a member of the EEA, the aforementioned provisions apply in respect of the Principality of Liechtenstein and, consequently, to the applicant as a foundation governed by Liechtenstein law. The gift at issue in the present case, made by the founder resident in Germany to the applicant, whose registered office and central administration are in Liechtenstein, is not confined within a single Member State and is not to be considered a purely national transaction, so the protection of free movement of capital is available to that initial endowment.

28 It follows from Article 40 of the EEA Agreement that the rules which prohibit restrictions on the movement of capital and the resultant discrimination in relations between the States party to the EEA Agreement are identical to those imposed by EU law in respect of relations between Member States. If restrictions on the free movement of capital between nationals of States party to the EEA Agreement must be assessed in the light of Article 40 of that Agreement and Annex XII thereto, those provisions consequently have the same legal scope as the provision of Article 63 TFEU (see judgments of the Court of 23 September 2003, *Ospelt and Schlössle Weissenberg*, C-452/01, EU:C:2003:493; of 11 June 2009, *Commission* v *Netherlands*, C-521/07, EU:C:2009:360; and of 28 October 2010, *Établissements Rimbaud*, C-72/09, EU:C:2010:645).

29 Under the settled case-law of the Court, Article 63(1) TFEU generally prohibits restrictions on movements of capital between Member States. The measures prohibited by that provision as restrictions on the movement of capital include those which are likely 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.

30 Such a measure also constitutes taxation of a gift where the gifted property is located in one Member State and the donor is resident in another, as the taxation has the effect of reducing the value of the gift (see judgments of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216, and of 4 September 2014, *Commission* v *Germany*, C-211/13, EU:C:2014:2148 and the case-law cited).

31 It follows that national gift-tax provisions are always contrary to the movement of capital where assets held abroad, because there is no possibility of taking into account debts and liabilities or for formal reasons such as shorter limitation periods, are valued less favourably, or higher, than assets held on national territory, or where residents with unlimited tax liability, as a result of higher tax-free allowances or lower tax rates, have less tax to pay on the same acquisitions than persons with limited tax liability (see Hessisches Finanzgericht, judgment of 7 March 2019, 10 K 541/17, EFG 2019, 930).

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32 In the present case, the first sentence of Paragraph 15(2) of the ErbStG gives entitlement to reduced taxation where a family foundation is established in on national territory by a resident, by deducting a higher tax-free allowance from the basis of assessment and applying a lower tax rate.

33 The consequence of that provision is therefore that a gift to a foundation with its registered office and central administration in Liechtenstein, the beneficiaries of which – as in the present case – consist exclusively of direct descendants, is subject in Germany to a higher gift tax than would have been levied if the gift in question had been made to a foundation with its registered office in Germany.

34 As a result, a foundation established on national territory will – under otherwise identical conditions – permanently have higher financial resources than foundations with their registered offices abroad. Such a cash-flow disadvantage which arises from a cross-border situation constitutes a restriction on free movement of capital (see judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt*, C-589/13, EU:C:2015:612).

35 The Chamber has doubts as to whether the restriction on the movement of capital effected by the first sentence of Paragraph 15(2) of the ErbStG can be justified having regard to EU law (see judgment of 11 June 2009, *Commission* v *Netherlands*, C-521/07, EU:C:2009:360).

36 Under Article 65(1)(a) TFEU, Article 63 TFEU is to be without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. In so far as that provision constitutes a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly (see judgments of the Court of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20; of 11 September 2008, *Eckelkamp and Others*, C-11/07, EU:C:2008:489; of 11 September 2008, *Arens-Sikken*, C-43/07, EU:C:2008:490; of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216; and of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480).

37 The Court has therefore held that a distinction must be drawn between differences in treatment permitted under Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. Before national tax legislation can be regarded as compatible with the TFEU provisions on the free movement of capital, the difference in treatment resulting from that legislation must concern situations which are not objectively comparable or must be justified by an overriding reason in the public interest (see judgments of the Court of 7 September 2004, *Manninen*, C-319/02, EU:C:2004:484; of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216; of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480; and of 17 March 2022, *AllianzGI-Fonds AEVN*, C-545/19, EU:C:2022:193).

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38 The taxable nature of the transfer of assets caused by an endowment transaction under Paragraph 7(1)(8) of the ErbStG applies both in respect of foundations established on national territory and in respect of the establishment, in the present case, of a Liechtenstein foundation. The situations are therefore objectively comparable (see also Hessisches Finanzgericht, judgment of 7 March 2019, 10 K 541/17, EFG 2019, 930).

39 The referring court has doubts as to whether there are overriding reasons in the public interest justifying a restriction on the free movement of capital resulting from the first sentence of Paragraph 15(2) of the ErbStG.

40 One overriding reason in the public interest is considered to be the need to safeguard the coherence of the tax system. Under the settled case-law of the Court, in order for an argument based on such a justification to succeed, it must be established that there is a direct link between the tax advantage concerned and the offsetting of that advantage by a specific tax levy (see judgments of the Court of 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138; of7 September 2004, *Manninen*, C-319/02, EU:C:2004:484; of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015; and of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339).

41 The Court has recognised the need to safeguard the coherence of the tax system where the structure of the relevant tax mechanisms reflects a logical symmetry – that is to say, there is a direct, personal and material link between the two tax mechanisms at issue and one is the logical complement of the other (see judgment of the Court of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588).

42 Moreover, such a national provision must be appropriate for ensuring that the objective pursued is attained and must not go beyond what is necessary in order to do so (see, to that effect, judgments of the Court of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662; of 4 September 2014, *Commission* v *Germany*, C-211/13, EU:C:2014:2148; and of 26 May 2016, *Commission* v *Greece*, C-244/15, EU:C:2016:359).

43 It is questionable whether those conditions are satisfied with regard to the first sentence of Article 15(2) of the ErbStG and Article 1(1)(4) of the ErbStG.

44 In order to assess the objective pursued by the provisions at issue, it is necessary first to consider the legislative history of the tax-class privilege provided for in the first sentence of Paragraph 15(2) of the ErbStG and the substitute inheritance tax (Ersatzerschaftsteuer) provided for in Paragraph 1(1)(4) of the ErbStG.

45 Both provisions were introduced simultaneously, as most recently amended, by a 1974 reform law. A look at the legislative history shows that the legislature assumed that the advantages granted by the tax-class privilege would be offset by the disadvantages of the substitute inheritance tax. In introducing substitute inheritance tax, the legislature had the objective of placing foundation structures

on an equal footing in terms of inheritance taxation, overall, with natural succession by means of recurring taxation. However, it was able to regulate that only for family foundations established on national territory. With regard to family foundations established abroad, the German legislature had and has no means of levying substitute inheritance tax.

46 In light of the above, the Chamber is of the opinion that the legislature intended to favour at the time of endowment only family foundations established on national territory, which would later be subject to recurring taxation (see Paragraph 1(1)(4) of the ErbStG).

47 However, the referring court has doubts as to whether that legislative objective is enough to affirm a direct, personal and material link between tax-class privilege and substitute inheritance tax, as required by the Court of Justice before it will assume coherence.

48 In particular, an argument to the contrary might be that, because of the relatively long 30-year cycle, any family foundation established on national territory will not necessarily remain in existence throughout that period, and a foundation's assets may change unpredictably during that length of time.

49 As a result of those uncertainties regarding the later taxation of the family foundation, both in principle and in terms of the amount, the Chamber has doubts as to whether it can be considered the logical complement to preferential treatment at the time of endowment of the family foundation.

50 The Chamber is not able to discern any other overriding reasons in the public interest within the meaning of Article 65(2) TFEU, which would objectively justify a restriction.

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