Germany: Recent and Pending CJEU Cases

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1. RF v. Finanzamt G (C-15/22)

The case, which was already discussed at last year's CJEU conference after the referral by the Bundesfinanzhof,[1] has in the meantime been decided by the Court of Justice. In contrast to Advocate General Medina, the CJEU found that there was no violation of Union law.

1.1. Facts of the Case

The case concerns a project manager who was employed by a development assistance association with registered office in Germany. Although the project manager worked in Africa, her place of residence and centre of interests was in Germany. The projects were funded by the Seventh and the Ninth European Development Fund (hereinafter jointly referred to as the EDFs, which in turn were funded directly by the Member States, which provided financial contributions to the EDFs. The salary paid by the association was subject to German income tax.[2] By contrast, the

1 See R. Ismer, in: G. Kofler et al. (eds.), *CJEU – Recent Developments in Direct Taxation 2022* (Vienna: Linde, 2024) 129 et seqq.

2 Summary of the request for a preliminary ruling pursuant to Art. 98 para. 1 of the Rules of Procedure of the CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 1 et seq.

salary would have been exempt from income tax under the so-called *Auslandstätigkeitserlass* (ATE, *Decree on Employment Abroad*)[3] had it been paid for activities in connection with German assistance.[4]

The *Bundesfinanzhof* considered the ATE in the present case not to violate Union law but had doubts on the matter. It saw no infringement of the fundamental freedoms – residents and non-residents are equally affected by this provision[5] – but considered that the taxation might be incompatible with Art. 4 para. 3 TEU and Arts. 208, 210 TFEU.[6] Art. 4 para. 3 TEU specifies the principle of sincere cooperation between the Union and the Member States. Art. 208 TFEU determines that *"the Union's development cooperation policy and that of the Member States complement and reinforce each other",* and in Art. 210 TFEU, it is stated that the Union and the Member States should coordinate their policies in this area.

1.2. Opinion of AG Medina as of 9 February 2023

In her Opinion,[7] Advocate General Medina saw both a violation of the free movement of capital and of Art. 4 para. 3 TEU in conjunction with Arts. 208, 210 TFEU.

Regarding the free movement of capital, she opined that the measure fell in the scope of the fundamental freedom.[8] In particular, she considered that the fact that the EDFs were funded through Member States' direct contributions implied that any transfer by the EDFs had to be equated to a movement of capital from other Member States.[9] Moreover, although the payments to the employee by the association were not part of the movement of capital by the EDFs, she nevertheless held that the measure fell in the personal scope of the fundamental freedom.[10] As a reason, she pointed out that the tax treatment of the wages affects the company and its input-output value. In her view, the measure also constituted a restriction of the free movement of capital, which could not be justified.[11] She argued in particular that

3 For doubts with regard to the German constitution, see K. Schlücke, *Vereinbarkeit der Verwaltungspraxis nach Abschn. I Nr. 4 ATE i.V.m. § 34c Abs. 5 EStG mit dem Unionsrecht*, ISR 2022, p. 116; D. Gosch, *Das EuGH-Urteil ‚Petersen und Petersen' und seine Konsequenzen für den Auslandstätigkeitserlass und die öffentliche Entwicklungshilfe*, IStR 2013, p. 325.

4 Summary of the request for a preliminary ruling pursuant to Art. 98 para. 1 of the Rules of Procedure of the CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 3-5.

5 Summary of the request for a preliminary ruling pursuant to Art. 98 para. 1 of the Rules of Procedure of the CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 12.

6 Summary of the request for a preliminary ruling pursuant to Art. 98 para. 1 of the Rules of Procedure of the CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 6.

7 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92.

8 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, paras. 44 et seqq.

9 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 46.

10 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 54.

11 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, paras. 57 et seqq. and 65 et seqq.

there was a restriction as *"the difference in tax treatment has an effect on the use of funding received by the development aid companies, namely by increasing the labour costs of the aid projects in question and, thus, reducing the available resources with respect to those projects and the capital made available to the companies."*[12]

She also found the measure incompatible with Art. 4 para. 3 TEU in conjunction with Arts. 208, 210 TFEU. She stressed that the Court had not yet applied the principle to national tax law in a manner that would go beyond the obligations that arose from Arts. 63 and 65 TFEU.[13] She then clarified that Art. 4 para. 3 TEU applies also when the Member States are exercising retained competences in the areas of direct taxation and development cooperation. Given that there were no explicit rules in the agreements setting up the EDFs, she had to examine the present case in the light of existing primary law provisions.[14] She found that there was a breach of Art. 4 para. 4, Art. 208 para. 1 and Art. 210 para. 1 TFEU, read in conjunction with Art. 4 para. 3 TEU: As taxation lowered the amount of money the fund had available for development purposes, it constituted a breach. In this context, she explicitly pointed out that such reasoning was not based on any difference in treatment of nationally and EDF funded projects.[15] In other words, even if Germany had not abstained from taxing salaries with domestic funding, she would nevertheless have found a violation.

1.3. Decision by the CJEU

By contrast, the Court of Justice held that there was neither a violation of the free movement of capital nor of the principle of sincere cooperation.[16] Regarding the free movement of capital, the Court found that there was, in effect, no movement of capital between Member States or between a Member State and a third country, as required by Art. 63 TFEU.[17] This was because the EDF was an entity established by means of an intergovernmental agreement. While the Member States funded the EDF, it was the EDF that paid out the assistance. This meant that the relevant movement of capital was between the European Funds and the association as the recipient, and not between Member States or between a Member State and a third country.[18] The Court thus refused to follow Advocate General Medina that trans-

12 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 63.
13 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 74, referring to CJEU, 30 June 2016, C 176/15, *Riskin and Timmermans,* EU:C:2016:488, para. 36; CJEU, 19 September 2012, C-540/11, *Levy and Sebbag*, ECLI:EU:C:2012:581, paras. 27 to 29.
14 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 90.
15 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 94.
16 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636.
17 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 40 et seqq., in particular 43 et seqq.
18 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 47 et seqq.

fers by the EDFs had to be equated to a movement of capital from other Member States.[19] Moreover, the Court considered the restrictive effects to be too uncertain and indirect.[20]

On Art. 4 para. 3 TEU, Art. 208 and Art. 210 TFEU, the Court considered them applicable although the EDFs were no EU institutions.[21] It reasoned that Member States cannot escape their obligations under the treaty by acting by way of intergovernmental agreement setting up entities.[22] However, individuals may rely only on provisions that impose precise and unconditional obligations, not requiring any further action on the part of the European Union or national authorities for their application.[23] The Court held that according to its wording, Art. 4 para. 3 TEU contained two positive and one negative obligations,[24] none of which, however, were violated by the measure: The first positive obligation consists in respecting, facilitating and assisting the European Union in carrying out tasks which flow from the Treaties. However, the Court found the obligation too imprecise for creating rights for individuals.[25] Under the second positive obligation, Member States must take all necessary measures for fulfilment of the obligations from the Treaties or acts of Union institutions. The obligation under Arts. 208, 210 TFEU too general to create individual rights.[26] Finally, the negative obligation prohibits Member States jeopardising the attainment of the European Union's objectives. While it would have been conceivable that the provision contained a prohibition of discriminatory taxation, the Court explicitly required a certain level of seriousness, which was found not the case here.[27]

1.4. Comments

At first glance, the discriminatory taxation appears somewhat unsatisfactory. Why should governments grant privileges to taxpayers who are paid by their funds but not to those whose work is paid for by European Development Funds? To prevent such discriminatory taxation, either a relative approach or an absolute approach could have been taken. Under the first approach, Member States could have taxed wages paid from funds by the EDFs, but only under the same conditions as wages paid from domestic funds. The second approach would have been even further reaching as it would have prohibited the taxation of wages borne by EDFs, irrespective of how comparable wages paid from domestic funds are taxed in the Member State.

19 Opinion of Advocate General Medina, 9 February 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:92, para. 46.
20 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 50.
21 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 52 et seqq.
22 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 54.
23 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 56.
24 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 57.
25 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, para. 58.
26 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 59 et seqq.
27 CJEU, 07 September 2023, C-15/22, *Finanzamt G*, ECLI:EU:C:2023:636, paras. 63 et seqq.

Upon closer inspection, however, the reasoning by the Court of Justice appears legally sound and convincing. An absolute approach would certainly have gone too far. Had the court followed the Advocate General's Opinion and decided that the wages could not have been taxed, irrespective of the tax treatment of comparable domestically funded wages, there would have been a tax immunity for wages stemming from EDFs. The immunity must arguably have been extended to independent services. Moreover, it would also have had to apply to remuneration funded by the European Union itself. Such immunity would also have gone beyond the immunity provided for international organizations.[28] It would have created substantial tensions regarding the ability to pay principle, as this would have implied significant non-taxation, in particular where the taxing power of the European Union or the intergovernmental organization would not encompass such payments (as would be the case for wages for projects funded by the European Union or the EDFs).

The Court is also right in rejecting the relative approach: First, a relative approach cannot convincingly be based on the free movement of capital. Technically, there may not be a movement of capital between Member States or between one Member State and a third country, as required by the wording of Art. 63 para. 1 TFEU. The EDFs are certainly not Member States. Nevertheless, depending on where the bank accounts are kept from which the payments are effectuated, there could well be a movement of capital between Member States or between a Member State and a third country. Moreover, the grammatical argument is more convincing in the framework of the original concept rather than for the wider understanding as a non-discrimination clause for taxation. By contrast, the Court's additional argument that applying the free movement of capital to the case at hand would risk an undue extension of the freedom is more convincing. Issues would also have arisen with respect to the standstill clause of Art. 64 TFEU as the ATE dates back to 1983. Instead, it would have been incumbent upon Member States to create binding tax rules, for example an exemption for wages paid for by the EDFs when, had they so desired. Second, a relative approach could have been based on the principle of sincere cooperation. However, the argument based on the wording of Art. 4 para. 3 TEU that there must otherwise be a jeopardy to the attainment of the European Union's objectives appears equally plausible.

2. AB v Finanzamt Köln-Süd (C-627/222)

2.1. Background

The pending case *AB v Finanzamt Köln-Süd,*[29] which has recently reached the phase of publication of the Opinion of Advocate General Campos Sánchez-Bordona,[30]

28 On this see e.g. R. Ismer & D. Endres-Reich, in: E. Reimer & A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions* (The Netherlands: Kluwer Law International, 2022), *Art. 28 OECD Model Convention.*

29 Pending Case C-627/22, *AB v Finanzamt Köln-Süd.*

30 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882.

concerns the guarantees under the EU-Swiss Agreement on the Free Movement of Persons (AFMP)[31] as it pertains to the taxation of cross-border employees. The AFMP was concluded between the European Communities and its Member States on the one hand and the Swiss Confederation on the other, and forms part of the Union legal order (Arts. 216 and 217 TFEU). It is binding upon the institutions of the EU and its Member States (Art. 216 para. 2 TFEU).[32]

Employees working in Germany are subject to German wage tax which is levied as a withholding tax pursuant to Secs. 38 et seq. of the German Income Tax Act EStG. The wage tax is a special mode of levying income tax for employees. German resident employees may opt for voluntary tax assessment.[33] If they choose to do so, income related expenses can be deducted, and the wage tax previously paid is credited to the final tax liability. Following the CJEU's judgment in *Schumacker*[34], German law was amended. Cross-border commuters can thus opt for unlimited tax liability under Sec. 1 para. 3 EStG if they derive the majority of their income in Germany. Taxpayers can then voluntarily file for tax assessment under the aforementioned provision which again allows them to deduct income related expenses, and particularly profit from joint tax assessment with a non-resident spouse, Sec. 1a EStG. The CJEU, in its 2013 judgment in *Ettwein,* decided that this privilege had to be extended to cross-border Swiss cases.[35]

In all other cases where a taxpayer derives employment income in Germany but is not a resident there, the taxpayer is subject to limited tax liability. The wage tax is in principle final. However, EU/EEA nationals residing in an EU/EEA State may apply for tax assessment,[36] which allows them to deduct at least income-related expenses. The question at issue in this case is whether this voluntary assessment must also be possible for Swiss residents deriving employment income in Germany.

2.2. Facts of the Case

The German national AB was a manager of a German company. He had lived in Switzerland since 2016.[37] From 2017 to 2019, he derived employment income from

31 Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Final Act – Joint Declarations, which entered into force on 01 June 2002, ABl. 2002, L 114, p. 6.

32 See on the AFMP e.g. R. Ismer, in: C. Hermann et. al. para. (eds.), *Einkommensteuer- und Körperschaftsteuergesetz* (Köln: Otto Schmidt Verlag, 2020) Einführung zum EStG, m.n. 566 et seqq.; K. Spies, *Die Wirkung des Freizügigkeitabkommens EU/Schweiz im Steuerrecht*, StuW 2017, p. 48 et seqq.

33 Under Sec. 46 para 2 no. 8 of the EStG.

34 CJEU, 14 February 1995, C-279/93, *Finanzamt Köln-Altstadt v Schumacker*, ECLI:EU:C:1995:31, para. 49.

35 CJEU, 28 February 2013, C-425/11, *Ettwein*, ECLI:EU:C:2013:121. See on this judgment e.g. A. Cloer, *Ausdehnung der Schumacker-Rechtsprechung auch auf Schweizer Grenzgänger*, DB 2013, p. 1141 et seqq.

36 See Sec. 50 para 2 sent. 1 and 2 sent. 2 no. 4 EStG.

37 See Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 20 et seqq.

his German employer. While living in Switzerland, AB either travelled to Germany by car or worked remotely from home inSwitzerland. AB was subject to limited tax liability under Sec. 1 para. 4 EStG. His employer withheld wage tax and remitted it to the German tax authorities. AB incurred income related expenses as he used a private car purchased under a leasing contract for business travel to Germany. Beyond that, AB owned two immovable properties located in Germany from which he derived rental income.

AB filed an income tax return declaring both income from the immovable properties and employment income. As to the latter, AB sought the benefit of Sec. 50 para 2 sent. 2 no. 4 lit. b EStG which allows for a voluntary tax assessment. The provision allows employees to receive a tax refund as the German wage tax does not take into account income related expenses. However, since this provision only applies to EU/EEA nationals residing in another EU or EEA State,[38] the notices of assessment issued by the tax authorities did not include AB's employment income (and hence the related expenses). AB lodged an administrative appeal and ultimately took legal action before the *Finanzgericht Köln (Financial Court of Cologne)*.

The *Finanzgericht Köln* referred a question on the interpretation of the AFMP to the CJEU. It asked whether the denial of a voluntary tax assessment infringes upon Arts. 7 and 15 AFMP in conjunction with Art. 9 para 2 of annex 2 to the AFMP. In this, the Court referred to two potentially relevant comparators, namely first German or EU/EEA nationals residing in Germany and German or EU/EEA nationals residing in an EU/EEA Member State other than Germany. Both can voluntarily opt for a tax assessment under national law and thus deduct income related expenses, ultimately resulting in a tax refund.

2.3. Opinion of AG Campos Sánchez-Bordona as of 16 November 2023

The Advocate General approaches the case by first recalling the characteristics of the AFMP and its interpretation by the CJEU as laid out in the judgment in *Wächtler*.[39] Against this background, the AG examines the personal scope of the AFMP. AB is not a 'typical' frontier worker in that he did not cross the border from Switzerland every day as envisaged by Art. 7 para. 1 of Annex I to the AFMP. Moreover, he invoked the AFMP against his own State of origin as he resided abroad. Yet the AG pointed to the case law of the CJEU which has repeatedly affirmed that the AFMP may not only be invoked against the country towards which an individual exercises the freedom of movement, but also against their own

38 Sec. 50 para. 2 sent. 7 EStG.

39 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 36.

country.[40] While in particular *Ettwein* concerned cross-border or frontier workers, there is, according to the AG, no reason not to transfer the ruling to the situation of AB as the freedom of movement of persons guaranteed would otherwise be impeded.[41] The AFMP thus prevents a discrimination not only on grounds of nationality, but it also extends to differences in treatment arising from the place of residence of employed persons covered by the AFMP.[42]

The AG then sheds light on the term 'tax concession' within the meaning of Art. 9 para. 2 of Annex I to the AFMP and argues that the term encompasses options available under national law for calculating tax liability in a more favourable way, such as voluntary assessment.[43] According to the AG, the denial of a voluntary tax assessment entails an unequal treatment under Art. 9 para. 2 of Annex I to the AFMP precisely because of AB's status as an employed person resident in Switzerland, since employed persons resident in Germany or EU/EEA States may opt for voluntary assessment which allows them to exclude the discharging effect of wage tax and potentially obtain a refund of any overpayments thereof, whereas AB as a Swiss resident may not. This differential treatment can deter employed persons resident in Germany from transferring their place of residence to Switzerland and continuing to receive their wages in Germany.[44]

The AG then discusses comparability under Art. 21 para. 2 AFMP. This provision states that residence-based distinctions between taxpayers that are not comparable are permissible. The AG argues, however, that such comparability exists because Germany has allowed EU/EEA nationals residing outside of Germany, and that are therefore subject to limited tax liability, to file for voluntary assessment.[45] The freedom of movement enjoyed by residents of EU/EEA States would be comparable to that which is enjoyed by Swiss residents. There would thus be comparability between those two groups.[46] The AG points out the background of the current provision under which residents of other EU/EEA States may apply for voluntary

40 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 39 with reference to CJEU, 15 December 2011, C-257/10, *Bergström*, ECLI:EU:C:2011:839, paras. 27-34; CJEU, 28 February 2013, C-425/11, *Ettwein*, ECLI:EU:C:2013:121, para. 33; CJEU, 15 March 2018, C-335/16, *Picart*, ECLI:EU:C:2018:184, para. 16. See P. Nürnberg, *Einordnung der EuGH-Urteile Picart und Wächtler unter Konvergenzerwägungen,* ISR 2019, p. 159 on why *Picart* was not within the ambit of the AFMP.

41 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 41.

42 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 68.

43 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 71.

44 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 73-77.

45 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 78-80.

46 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 80.

assessment – it was first introduced following the judgment in *Schumacker*. The same logic would now warrant an extension of the possibility to apply for voluntary tax assessment to Swiss residents working in Germany.[47]

The AG then elaborates that the differential treatment cannot be justified by the need to ensure the imposition, payment and effective recovery of income tax in Germany, and the objective to forestall tax evasion. Firstly, this is because the wage tax, which is levied regardless of whether or not a tax assessment is possible, ensures that the income tax is collected by the German tax authorities. Moreover, the AG points to the amendment of the pertinent provision following the judgment in *Schumacker*. If the issues mentioned above truly existed, Germany would also not have been obliged to extend voluntary tax assessment to EU/EEA nationals with a limited tax liability.[48] The German government furthermore cited the fact that AB could have achieved the same result – tax assessment and deductibility of expenses with the result of a refund – under the procedure provided for by Sec. 39b para 2 EStG.[49] However, this line of reasoning was rejected by the AG since the alternative procedure is subject to time limits and conditions.[50] Moreover, according to the case law of the CJEU, the possibility to opt for another tax regime is not capable of mitigating the discriminatory effects of a tax regime that is contrary of EU law.[51] The same reasoning could be transferred to the 'preservation of fiscal coherence' as grounds for justification as the argument in that respect would again be that the taxpayer has the alternative option of seeking to have less tax withheld at source.[52]

Finally, the AG examines the standstill clause of Art. 13 of the AFMP under which the Contracting Parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals. The AG swiftly rejects the reasoning of the German Government according to which this provision could be read as allowing for old restrictions (that existed at the time of the conclusion of the AFMP) to continue to exist.[53]

47 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 81-83.

48 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 87-89.

49 Under this provision, the employer is required to take into account deductions for business expenses declared by the employee in the computation of the wage tax. The taxpayer is subsequently obliged to apply for a tax assessment. This procedure is also open for taxpayers with a limited tax liability.

50 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 92.

51 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 92 et seq. with reference to the pertinent case law. He holds that while this case law postdates the conclusion of the AFMP, it would merely clarify prior case law.

52 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 94.

53 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, paras. 95-99.

2.4. Comments

The case is yet another piece of the puzzle that is the CJEU's case law on the AFMP in the area of taxation. Step by step, the principles developed in the context of the fundamental freedoms are being transferred to the AFMP. Therefore, this case is probably not what will be referred to as a landmark case in the future. Nevertheless, the case warrants some clarifications on the correct approach to interpreting the AFMP.

As an international agreement, the AFMP has to be interpreted autonomously. Nonetheless, there is a convergence with the fundamental freedoms.[54] This inevitably means that any interpretation of the AFMP will ultimately be faced with the question of the transferability of CJEU case law. In assessing this transferability, the limit of Art. 16 para. 2 AFMP has to be taken into account.[55]

The AG in his opinion repeatedly mentions that the discriminatory tax treatment would have to be verified "*by comparison with that afforded to employed persons who, while pursuant an activity similar to that of AB, live in Germany or in other Member States of the European Union or the EEA*".[56] In a later passage, in discussing comparability under Art. 21 para. 2 AFMP, he explicitly limits the analysis to the horizontal comparator, i.e. residents of EU/EEA states that are nationals of one of these states.[57] However, in *Wächtler,* the CJEU clarified that only the former comparator is valid under the AFMP.[58] It thereby diverged from the Opinion of AG *Wathelet* who had relied on a horizontal comparator.[59] It has therefore become clear that the relevant comparator always has to be a purely domestic constellation – just as is the case for the fundamental freedoms. The confusion presumably stems from the fact that most of the cases on the AFMP ultimately boil down to the transferability of CJEU case law on the fundamental freedoms. In this context, a horizontal perspective is, of course, warranted.

54 R. Ismer, in: C. Hermann et. al. (eds.), *Einkommensteuer- und Körperschaftsteuergesetz* (Köln: Otto Schmidt Verlag, 2020) m.n. 557; M. Jung, *The Switzerland-EC Agreement on the Free Movement of Persons: Measures Equivalent to Those in the EC Treaty – A Swiss Income Tax Perspective,* European Taxation 2007, p. 508; K. Spies, *Die Wirkung des Freizügigkeitabkommens EU/Schweiz im Steuerrecht,* StuW 2017 p. 48 et seqq.; in detail M. Sunde, *Entfalten die Grundfreiheiten ihre steuerlichen Auswirkungen auch im Verhältnis zur Schweiz?,* ISR 2013, p. 568.

55 On this provision see e.g. M. Lang, *Die Bedeutung der Rechtsprechung des EuGH für die Auslegung des Art. 16 Abs. 2 Freizügigkeitsabkommen*, in: C. Lunzi et al. (eds.), Festschrift für Markus Reich, (Zürich: Schulthess 2014), p. 409.

56 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 72, see also paras. 74 et seq.

57 Opinion of Advocate General Campos Sánchez-Bordona, 16 November 2023, C-627/22, *AB v Finanzamt Köln-Süd*, ECLI:EU:C:2023:882, para. 78.

58 CJEU, 26 February 2019, C-581/17, *Wächtler,* ECLI:EU:C:2019:138, para. 56. By contrast, blurry in this respect: CJEU, 21 September 2016, C-478/15, *Radgen,* ECLI:EU:C:2016:706, para. 42.

59 Opinion of Advocate General Wathelet, 27 September 2018, C-581/17, *Wächtler*, ECLI:EU:C:2018:779, para. 82.