

**Case C-386/04**

**Centro di Musicologia Walter Stauffer**

**v**

**Finanzamt München für Körperschaften**

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Free movement of capital – Corporation tax – Exemption of rental income – Residence qualification – Charitable foundation governed by private law)

Summary of the Judgment

*Free movement of capital – Restrictions*

*(EC Treaty, Arts 73b and 73d (now Arts 56 EC and 58 EC))*

Article 73b of the Treaty (now Article 56 EC), in conjunction with Article 73d of the Treaty (now Article 58 EC), must be interpreted as precluding a Member State which exempts from corporation tax rental income received in its territory by charitable foundations which, in principle, have unlimited tax liability if they are established in that Member State, from refusing to grant the same exemption in respect of similar income to a charitable foundation established under private law solely on the ground that, as it is established in another Member State, that foundation has only limited tax liability in its territory.

It is not a requirement under Community law for Member States automatically to confer on foreign foundations recognised as having charitable status in their Member State of origin the same status in their own territory. However, where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, which it is a matter for the national authorities of that other State, including its courts, to determine, the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.

Such a difference in treatment cannot be justified by the pursuit of objects connected with the promotion at national level of culture and high-level training where the national legislation in question is not based on the premiss that the activities pursued by charitable foundations must benefit the national general public.

Moreover, such legislation cannot be justified by the need to ensure effective fiscal supervision. Admittedly, before granting a foundation a tax exemption, a Member State is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management. However, while it may prove more difficult to carry out the necessary checks where foundations are established in other Member States, these are disadvantages of a purely administrative nature which are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such foundations the same tax exemptions as are granted to foundations of the same kind, which, in principle, have unlimited tax liability in that State.

Furthermore, where there is no direct link between a tax advantage consisting of exemption from tax of rental income and the offsetting of that advantage by a particular tax levy, the restriction in question cannot be justified by the need to protect the cohesion of the tax system.

The same applies with regard to the need to protect the basis of tax revenue, since reduction in tax revenue cannot be regarded as an overriding reason in the public interest which would justify a measure which is, in principle, contrary to a fundamental freedom.

As regards the fight against crime, the fact that a foundation is established in another Member State cannot give rise to a general assumption of criminal activity. Moreover, to preclude such foundations from entitlement to a tax exemption when a number of measures are available to monitor their accounts and activities may be considered to be a measure which goes beyond what is necessary to combat crime.

(see paras 39-40, 45, 47-48, 55-56, 58-62, operative part)

## JUDGMENT OF THE COURT (Third Chamber)

14 September 2006 (\*)

(Free movement of capital – Corporation tax – Exemption of rental income – Residence qualification – Charitable foundation governed by private law)

In Case C-386/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Bundesfinanzhof (Germany), made by decision of 14 July 2004, received at the Court on 8 September 2004, in the proceedings

**Centro di Musicologia Walter Stauffer**

## **Finanzamt München für Körperschaften,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr, A. Borg Barthet and U. Lohmus (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after considering the observations submitted on behalf of:

- the Centro di Musicologia Walter Stauffer, by O. Thömmes, Rechtsanwalt,
- the Finanzamt München für Körperschaften, by C. Anneser and K. Schmid, acting as Agents,
- the German Government, by A. Tiemann and U. Forsthoff, acting as Agents,
- Ireland, by D. O’Hagan, acting as Agent, D. Moloney, BL, and K. Maguire, BL,
- the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,
- the United Kingdom Government, by C. White, acting as Agent, and R. Hill, barrister,
- the Commission of the European Communities, by K. Gross and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

### **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Article 58 of the EC Treaty (now Article 48 EC), Article 59 of the EC Treaty (now, after amendment, Article 49 EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 73b of the EC Treaty (now Article 56 EC).

2 The reference arose in proceedings between the Centro di Musicologia Walter Stauffer, a foundation established under Italian law (‘the foundation’), and the Finanzamt München für Körperschaften (Munich Corporation Tax Office) (‘the Finanzamt’), concerning the liability of certain income to corporation tax for the 1997 tax year.

### **Legal context**

#### *Community legislation*

3 Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), entitled 'Nomenclature of the capital movements referred to in Article 1 of the Directive', states, in its introduction:

'In this Nomenclature, capital movements are classified according to the economic nature of the assets and liabilities they concern, denominated either in national currency or in foreign exchange.

The capital movements listed in this Nomenclature are taken to cover:

- all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers. The transaction is generally between residents of different Member States although some capital movements are carried out by a single person for his own account (e.g. transfers of assets belonging to emigrants),
- operations carried out by any natural or legal person ... ,
- access for the economic operator to all the financial techniques available on the market approached for the purpose of carrying out the operation in question. For example, the concept of acquisition of securities and other financial instruments covers not only spot transactions but also all the dealing techniques available: forward transactions, transactions carrying an option or warrant, swaps against other assets, etc. ... ,
- operations to liquidate or assign assets built up, repatriation of the proceeds of liquidation thereof ... or immediate use of such proceeds within the limits of Community obligations,
- operations to repay credits or loans.

This Nomenclature is not an exhaustive list for the notion of capital movements –whence a heading XIII – F, "Other capital movements – Miscellaneous". It should not therefore be interpreted as restricting the scope of the principle of full liberalisation of capital movements as referred to in Article 1 of the Directive.'

4 That nomenclature contains 13 different categories of capital movements. Under heading II, entitled 'Investments in real estate', are:

'A Investments in real estate on national territory by non-residents  
... '.

#### *National legislation*

5 The relevant provisions of the Körperschaftsteuergesetz (Law on Corporation Tax) 1996 ('the KStG') are worded as follows:

'Paragraph 2: Limited tax liability

The following shall be subject to limited liability to corporation tax:

1. corporations, associations of persons and bodies of assets neither managed nor established in Germany, on their domestic income; ...

Paragraph 5: Exemptions

(1) the following shall be exempt from corporation tax:

...

9. corporations, associations of persons and bodies of assets which, under their statutes, act of foundation or other constitution and under their de facto management, pursue exclusively and directly charitable, benevolent or other religious objects (Paragraphs 51 to 68 of the Abgabenordnung (Tax Code) 1977 ['the AO']). If commercial activities are undertaken, tax exemption shall be excluded. The second sentence shall not apply to self-managed forestry activities;

(2) The exemptions under subparagraph 1 shall not apply to:

...

3. persons with limited tax liability within the meaning of Paragraph 2(1).

...

#### Paragraph 8: Determination of income

(1) The provisions of the Einkommensteuergesetz (Law on Income Tax) and of this Law shall determine what is to be regarded as income and the way in which income is to be determined ...'

6 The relevant provisions of the Einkommensteuergesetz 1990 ('EStG') read as follows:

#### 'Paragraph 21: Rental

(1) The following shall be rental income:

1. income from rental of immovable property, in particular land, buildings, parts of buildings, ...

#### Paragraph 49: Income subject to limited tax liability

(1) The following shall be domestic income for the purposes of limited income tax liability (Paragraph 1(4)):

...

6. rental income, where the immovable property, conglomerations of property or rights are located ... in Germany ... .'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

7 The foundation, which is recognised as having charitable status under Italian law, is the proprietor of commercial premises in Munich.

8 The Finanzamt (Tax Office) assessed the income the foundation received from rental of that commercial property to corporation tax for the 1997 tax year. The foundation does not have any premises in Germany for the purposes of pursuing its activities and does not have any subsidiaries. The services ancillary to the rental of that commercial property are provided by a German property management agent.

9 It is clear from its statutes in force for the tax year at issue that the foundation is non-profit-

making. It pursues exclusively cultural objects in the field of education and training by providing instruction in the classical methods of production of stringed instruments, the history of music and musicology in general. The foundation may endow one or more scholarships to enable young Swiss people, preferably from the city of Berne (Switzerland), to reside in Cremona (Italy) during the entire period of instruction.

10 The information provided by the national court shows that, during the tax year at issue, the foundation pursued charitable objects within the meaning of Paragraphs 51 to 68 of the AO. According to that court, Article 52 of the AO does not require promotion of the interests of the general public to be undertaken for the benefit of German nationals. Accordingly, the foundation is, in principle, exempt from corporation tax under the first sentence of Paragraph 5(1)(9) of the KStG, and it is not liable to tax on its income under the second and third sentences of that provision either, since the letting of the property did not extend beyond asset management and did not constitute a commercial business activity within the meaning of Paragraph 14(1) of the AO.

11 However, since the foundation's seat and management are in Italy, the rental income it receives in Germany is subject to limited tax liability. Accordingly, therefore, Paragraph 5(2)(3) of the KStG must be applicable. Under that provision, the tax exemption, which applies, *inter alia*, to corporations pursuing exclusively and directly charitable objects, does not apply to taxable persons with limited tax liability. As a result, the foundation was assessed to corporation tax on the rental income it received in Germany from the letting of the commercial property.

12 The foundation entered an objection against the 1997 tax assessment on the ground that, as it is a charitable foundation, it should have been exempt from tax. That objection was rejected. It then lodged an appeal with the Finanzgericht München (Finance Court, Munich), which was unsuccessful. Subsequently, the foundation lodged an appeal on a point of law with the Bundesfinanzhof (Federal Finance Court), which has doubts as to whether the exclusion of corporations from the tax exemption provided for by Paragraph 5(2)(3) of the KStG is compatible with the requirements of Community law.

13 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

Is it contrary to Article 52 EC, in conjunction with Article 58 of the EC Treaty, Article 59 of the EC Treaty, in conjunction with Articles 66 of the EC Treaty and 58 of the EC Treaty and Article 73b of the EC Treaty, for a charitable foundation established under private law in another Member State, with limited liability to tax on its rental income in Germany, unlike a charitable foundation established in Germany, with unlimited liability to tax and receiving similar income, not to be entitled to exemption from corporation tax?

### **The question referred for a preliminary ruling**

14 By its question, the Bundesfinanzhof asks, in essence, whether the provisions of the EC Treaty relating to the right of establishment, the freedom to provide services and/or the free movement of capital preclude a Member State, which exempts from corporation tax rental income received in its territory by charitable foundations with, in principle, unlimited liability to tax if they are established in that Member State, from refusing to grant the same exemption to a charitable foundation governed by private law in respect of similar income on the basis that, as it is established in another Member State, it has only limited liability to tax in its territory.

15 As a preliminary point, it should be noted that, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law (see, *inter alia*, Case C-80/94 *Wielockx* [1995] ECR I-2493,

paragraph 16, Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 14, and Case C-513/03 *Van Hilten-van der Heijden* [2006] ECR I-0000, paragraph 36).

16 It is then necessary to examine whether, in the light of the facts of the case, the foundation may rely on the rules relating to the right of establishment, the rules on freedom to provide services and/or the rules governing free movement of capital.

17 Freedom of establishment, which Article 52 of the EC Treaty confers on Community nationals and which includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 58 of the EC Treaty, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (Case C-307/97 *Saint Gobain* [1999] ECR I-6161, paragraph 35, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 30, and Case C-471/04 *Keller Holding* [2006] ECR I-0000, paragraph 29).

18 According to the case-law of the Court, the concept of establishment within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see, to that effect, Case 2/74 *Reyners* [1974] ECR 631, paragraph 21, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25).

19 However, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed. It is clear from the account provided by the national court that the foundation does not have any premises in Germany for the purposes of pursuing its activities and that the services ancillary to the letting of the property are provided by a German property management agent.

20 It must therefore be concluded that the provisions governing freedom of establishment are not applicable in circumstances such as those in the dispute in the main proceedings.

21 It then falls to be determined whether the foundation may rely on the provisions in Articles 73b of the EC Treaty and 73g of the EC Treaty concerning the free movement of capital.

22 The Treaty does not define the notions of 'capital movements' or 'payments'. However, it is established case-law that, in as much as Article 73b of the EC Treaty substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (Articles 67 to 73 of the EEC Treaty having been replaced by Articles 73b to 73g of the EC Treaty, now Articles 56 EC to 60 EC), the nomenclature in respect of 'movements of capital' annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of those provisions, subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive (see, inter alia, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 30, and *Van Hilten-van der Heijden*, paragraph 39).

23 It is not disputed that the foundation, whose seat is in Italy, has commercial property in Munich which it lets. Among the capital movements listed in Annex I to Directive 88/361, under

heading II entitled 'Investments in real estate', are investments in real estate on national territory by non-residents.

24 It follows that free movement of capital covers both the ownership and administration of such property and it is not therefore necessary to consider whether the foundation acts as a provider of services.

25 Under Article 73b of the EC Treaty, any restriction on capital movements between Member States is forbidden.

26 In order to determine whether national legislation such as that at issue in the main proceedings involves a restriction on the free movement of capital within the meaning of Article 73b of the EC Treaty, it is necessary to examine whether the application of that article has a restrictive effect on charitable foundations established in other Member States in so far as rental income received in national territory does not qualify for the exemption enjoyed by other foundations of the same kind which have unlimited tax liability in that territory.

27 The fact that tax exemption for rental income applies only to charitable foundations which, in principle, have unlimited tax liability in Germany places foundations whose seats are in another Member State at a disadvantage and may constitute an obstacle to the free movement of capital and payments

28 It follows from the above that legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 73b of the EC Treaty.

29 It is necessary, however, to consider whether such a restriction may be justified in the light of the provisions of the Treaty.

30 In accordance with Article 73d(1)(a) of the EC Treaty, Article 73b takes effect without prejudice to the right available to 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 the place where their capital is invested.

31 However, Article 73d(1)(a) of the EC Treaty, which, as a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly, cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to their place of residence or the Member State in which their capital is invested is automatically compatible with the Treaty. The derogation in Article 73d(1)(a) of the EC Treaty is itself limited by Article 73d(3) of the EC Treaty, which provides that the national provisions referred to in Article 73d(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b' (see Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 28).

32 Unequal treatment permitted under Article 73d(1)(a) of the EC Treaty must therefore be distinguished from arbitrary discrimination or disguised restrictions prohibited under Article 73d(3) of the EC Treaty. According to the case-law, for national tax legislation such as that at issue in the main proceedings, which distinguishes between foundations with unlimited tax liability and those with limited liability, to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest, such as the need to safeguard the coherence of the tax system or effective fiscal supervision (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43, and *Manninen*, paragraph 29). In order to be



justified, moreover, the difference in treatment between charitable foundations with unlimited tax liability in Germany and foundations of the same kind established in other Member States must not go beyond what is necessary in order to attain the objective of the legislation in question.

33 The Finanzamt, together with the German and United Kingdom Governments, maintain that a charitable foundation with unlimited tax liability and the applicant, which has limited tax liability on account of the fact that it is non-resident, are not in a comparable situation.

34 The former plays an active role in German society and performs duties which would otherwise have to be carried out by local or national authorities, which would be a burden on the State budget, whereas the charitable activities of the latter – both actual and those provided for in their statutes – concern only the Italian Republic and the Swiss Confederation.

35 Moreover, the conditions under which Member States confer charitable status on a foundation, which entails the grant of tax benefits and other privileges, varies from one Member State to the other, according to each State's conception of public utility and the scope given by it to the concept of 'charitable purposes'. It follows that a foundation which meets the requirement imposed by Italian law may not be in a comparable situation to a foundation which meets the requirements imposed by German law since it is highly likely that the requirements applicable in each Member State concerning the conferring of charitable status are different.

36 None of those arguments can be upheld.

37 Firstly, whilst Member States are entitled to require a sufficiently close link between foundations upon which they confer charitable status for the purposes of granting certain tax benefits and the activities pursued by those foundations, it is clear from the order for reference that it is irrelevant, for the purposes of the decision in the case in the main proceedings, whether such a link exists.

38 Paragraph 52 of the AO provides that a corporation pursues charitable objects where its activities are directed at the promotion of the interests of the general public in a manner other than for profit but does not, however, make a distinction as to whether those activities are carried out in national territory or abroad. The national court states that the promotion of the interests of the general public within the meaning of that provision does not mean that such measures must benefit nationals of the Federal Republic of Germany or its inhabitants.

39 Secondly, as the Advocate General observed at point 94 of her Opinion, it is the case that it is not a requirement under Community law for Member States automatically to confer on foreign foundations recognised as having charitable status in their Member State of origin the same status in their own territory. Member States have a discretion in this regard that they must exercise in accordance with Community law (see, to that effect, Case C-415/04 *Kinderopvang Enschede* [2006] ECR I-0000, paragraph 23). In those circumstances, they are free to determine what the interests of the general public they wish to promote are by granting benefits to associations and foundations which pursue objects linked to such interests in a disinterested manner.

40 Nevertheless, the fact remains that where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, which it is a matter for the national authorities of that other State, including its courts, to determine, the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.

41 In the dispute in the main proceedings, the national court states that, during the financial

year at issue, the foundation pursued charitable objects within the meaning of Paragraphs 51 to 68 of the AO and also satisfied the requirements under the terms of its statutes to enable it to qualify for exemption from corporation tax in accordance with the first sentence of Paragraph 5(1)(9) of the KStG.

42 Accordingly, in circumstances such as those in the main proceedings, the effect of Paragraph 5(2)(3) of the KStG is to treat foundations in objectively comparable situations differently by reason of their place of residence. It follows that such a fiscal measure cannot, in principle, constitute unequal treatment permitted under Article 73d(1)(a) of the EC Treaty, unless it can be justified by overriding reasons in the general interest (see, to that effect, *Verkooijen*, paragraph 46, *Manninen*, paragraph 29, and Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 38).

43 In order to justify the difference in treatment between charitable foundations with unlimited tax liability in Germany and those that are not established there, arguments have been advanced before the Court relating, inter alia, to the promotion of culture, to training and education, to effective fiscal supervision, to the need to ensure the cohesion of the national tax system, to the need to protect the basis of tax revenue and to the fight against crime.

44 Firstly, the Finanzamt considers that the tax privilege enjoyed by national foundations pursuing cultural objects is covered by Article 92(3)(d) of the EC Treaty (now, after amendment, Article 87(3)(d) EC), and Article 128 of the EC Treaty (now, after amendment, Article 151 EC) and, accordingly, that the derogating rules applicable to national foundations pursuing exclusively objects relating to education and training are compatible with Community law.

45 That argument cannot be upheld. Whilst certain objects connected with the promotion at national level of culture and high-level training may constitute overriding reasons in the general interest (see, to that effect, Case C-198/89 *Commission v Greece* [1991] ECR I-727, and Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 46), the fact remains that it does not appear, in the light of the information available to the Court, that the tax exemption scheme at issue pursues such objectives or constitutes aid governed by Articles 92 and 93 of the EC Treaty. It is clear from the order for reference that Paragraph 52 of the AO is not based on the premiss that the activities pursued by charitable foundations must benefit the national general public.

46 Secondly, the Finanzamt, the German Government, Ireland and the United Kingdom Government maintain that the tax legislation at issue in the dispute in the main proceedings is justified, firstly, by the difficulty of ascertaining whether, and to what extent, a charitable foundation which is established abroad actually fulfils the objects laid down in its statutes in accordance with national law and, secondly, by the need to monitor the effective management of that foundation.

47 The Court has, on many occasions, held that effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty (see, inter alia, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8, and Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31).

48 Thus, before granting a foundation a tax exemption, a Member State is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report. Admittedly, where foundations are established in other Member States, it may prove more difficult to carry out the necessary checks. Nevertheless, these are disadvantages of a purely administrative nature which are not sufficient to justify a refusal on the part of the authorities of the

State concerned to grant such foundations the same tax exemptions as are granted to foundations of the same kind, which, in principle, have unlimited tax liability in that State (see, to that effect, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 29).

49 There is nothing to prevent the tax authorities concerned from requiring a charitable foundation claiming exemption from tax to provide relevant supporting evidence to enable those authorities to carry out the necessary checks. Further, national legislation which absolutely prevents the taxpayer from submitting such evidence cannot be justified in the name of effectiveness of fiscal supervision (see, to that effect, *Laboratoires Fournier*, paragraph 25).

50 Moreover, the tax authorities concerned may, pursuant to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax, including information as to whether that person may be granted a tax exemption (see, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26, and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42).

51 Thirdly, the German Government maintains that it would threaten the cohesion of the national tax system to exempt from corporation tax income received by non-resident foundations in respect of the management of property they own in Germany. According to that Government, the effect of such an exemption would be to remove liability to tax in respect of activities devoted to the public interest pursued by charitable foundations. In so far as such foundations assume direct responsibility for the common good, they act as substitute for the State, which may, in return, grant them tax benefits without breaching its obligation of equal treatment.

52 In that regard, the Court has acknowledged that the need to safeguard the cohesion of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty (Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28, and Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraph 21).

53 However, in order for an argument based on such a justification to succeed, a direct link must be established between the grant of the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, to that effect, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 18; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 58; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 29; *Vestergaard*, paragraph 24; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 52).

54 As is shown by paragraphs 21 to 23 of the judgment in *Bachmann* and paragraphs 14 to 16 of the judgment in *Commission v Belgium*, those judgments are based on the finding that, in Belgian law, there was a direct link, in relation to the same taxpayer liable to income tax, between the ability to deduct insurance contributions from taxable income and the subsequent taxation of sums paid by the insurers (*Manninen*, paragraph 42).

55 The German Government's argument seeking to justify a restriction on the free movement of capital by the need to ensure the cohesion of its tax system cannot be accepted, however.

56 Firstly, a tax advantage consisting of exemption from tax of rental income does not correspond to a charge levied on foundations which, in principle, have unlimited tax liability. In other words, there is no direct link, from the point of view of the tax system, between that exemption and the offsetting of that advantage by a particular tax levy.

57 Secondly, whilst the desire to grant the tax exemption only to charitable foundations which pursue the policy objectives of that Member State may, *prima facie*, appear legitimate, the fact remains that, in the light of the information submitted to the Court by the national court, Paragraph 52 of the AO is not based on the premiss that measures promoting the interests of the general public are required to benefit the German general public. On that basis, the national court concludes that the foundation in question in the main proceedings may be entitled to the exemption if, whilst retaining the same objects, it established its seat in Germany.

58 Thirdly, the German Government states that the refusal to grant the tax exemption to foundations with limited liability to tax is justified by the need to protect the basis of tax revenue.

59 Whilst, for the Federal Republic of Germany, recognition of the right to exemption from corporation tax for non-resident charitable foundations would entail a reduction in its corporation tax receipts, it has been consistently held in the case-law that reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom (see, to that effect, *Verkooijen*, paragraph 59; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56; *X and Y*, paragraph 50; and *Manninen*, paragraph 49).

60 Fourthly, it was argued at the hearing, in particular by the Finanzamt and the German Government, that it is not inconceivable that criminal gangs and terrorist organisations may assume the legal status of a foundation for the purposes of money-laundering and the illegal transfer of funds from one Member State to another.

61 Even if, by granting a tax exemption only to charitable foundations that are established in its territory, the authorities of a Member State seek to combat crime, the fact remains that the fact that a foundation is established in another Member State cannot give rise to a general assumption of criminal activity. Moreover, to preclude such foundations from entitlement to a tax exemption when a number of measures are available to monitor their accounts and activities may be considered to be a measure which goes beyond what is necessary to combat crime (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 74).

62 In the light of the foregoing, the answer to the question referred must be that Article 73b of the EC Treaty, in conjunction with Article 73d of the EC Treaty, must be interpreted as precluding a Member State which exempts from corporation tax rental income received in its territory by charitable foundations which, in principle, have unlimited tax liability if they are established in that Member State, from refusing to grant the same exemption in respect of similar income to a charitable foundation established under private law solely on the ground that, as it is established in another Member State, that foundation has only limited tax liability in its territory.

### **Costs**

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 73b of the EC Treaty, in conjunction with Article 73d of the EC Treaty, must be interpreted as precluding a Member State which exempts from corporation tax rental income received in its territory by charitable foundations which, in principle, have unlimited tax liability if they are established in that Member State, from refusing to grant the same exemption in respect of similar income to a charitable foundation established under private law solely on the ground that, as it is established in another Member State, that foundation**

**has only limited tax liability in its territory.**

[Signatures]

\* Language of the case: German.