Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 30 April 2015 [1]

Case C-241/14

Roman Bukovansky
v
Finanzamt Lörrach(Request for a preliminary ruling

from the Finanzgericht Baden-Württemberg (Germany))

(Agreement 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 — Relationship between that agreement and bilateral agreements on double taxation — Equal treatment — Discrimination on grounds of nationality — National of a Member State of the European Union — Income from employment received in that Member State — Transfer of residence to Switzerland — Extended tax liability)

1. By the present request for a preliminary ruling, the Finanzgericht Baden-Württemberg (Germany), the referring court, requests the Court to interpret certain provisions of the Agreement 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, signed in Luxembourg on 21 June 1999, [2] ('the Agreement') in relation to a provision contained in the Bilateral Agreement for the avoidance of double taxation with respect to taxes on income and on capital, concluded between the Swiss Confederation and the Federal Republic of Germany ('the German-Swiss Bilateral Agreement'). [3]

2. The Finanzgericht Baden-Württemberg asks the Court, in essence, to rule on whether the Agreement precludes a provision of the above Bilateral Agreement which provides for a form of 'extended tax liability' under which the German tax authorities may, during a given period, continue to subject to German tax income generated in Germany by a natural person who has transferred his residence to Switzerland but who is not a Swiss national and was subject to unlimited tax liability in Germany for a total of at least five years.

3. In addition to the questions relating to the compatibility of that tax treatment with the principles laid down in the Agreement, the present case raises an important general question on which very different positions have been put forward in the course of proceedings. The Court will be called upon to interpret the scope of the article of the Agreement governing the relationship between the Agreement and bilateral agreements on double taxation. In the light of that article the Court will have to rule on whether the Agreement or such a bilateral agreement should prevail in the event that they contain incompatible provisions.

1 — Original language: Italian.

2 — OJ 2002 L 114, p. 6.

3 — *Bundesgesetzblatt* II 1972, p. 1022, as amended most recently by the Revising Protocol of 12 March 2002 (*Bundesgesetzblatt* 2003, p. 68).

I – **Legal background**

A – *The Agreement*

4. According to Article 1(a) and (d) of the Agreement, its objective is, in particular, to accord nationals of the Member States of the European Union and the Swiss Confederation a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties, and to accord them the same living, employment and working conditions as those accorded to nationals.

5. Article 2 of the Agreement is entitled 'Non-discrimination' and provides that '[n]ationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality'.

6. Paragraph 2 of Article 16 of the Agreement, which is entitled 'Reference to Community law', is worded as follows:

'Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.'

7. Article 21 of the Agreement, entitled 'Relationship to bilateral agreements on double taxation', provides in paragraphs 1 and 2 as follows:

'1. The provisions of bilateral agreements between Switzerland and the Member States of the European Community on double taxation shall be unaffected by the provisions of this Agreement. In particular, the provisions of this Agreement shall not affect the double taxation agreements' definition of "frontier workers".

2. No provision of this Agreement may be interpreted in such a way as to prevent the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence.'

8. Article 22 of the Agreement, for its part, concerns the 'Relationship to bilateral agreements on matters other than social security and double taxation' and provides:

'1. Notwithstanding the provisions of Articles 20 and 21, this Agreement shall not affect agreements linking Switzerland, of the one part, and one or more Member States of the European Community, of the other part, such as those concerning private individuals, economic operators, cross-border cooperation or local frontier traffic, in so far as they are compatible with this Agreement.

2. In the event of incompatibilities between such agreements and this Agreement, the latter shall prevail.'

9. Annex I to the Agreement relates to free movement of persons and Chapter II of that annex contains the provisions on employed persons. Article 7(1) of Annex I contains the definition of 'employed frontier workers'. Under that provision, '[a]n employed frontier worker is a national of a Contracting Party who has his residence in the territory of a Contracting Party and who pursues an activity as an employed person in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week.'

10. Article 9 of Annex I, entitled ‘Equal Treatment’, provides as follows:

‘1. An employed person who is a national of a Contracting Party may not, by reason of his nationality, be treated differently in the territory of the other Contracting Party from national employed persons as regards conditions of employment and working conditions, especially as regards pay, dismissal, or reinstatement or re-employment if he becomes unemployed.

2. An employed person and the members of his family referred to in Article 3 of this Annex shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.’

B – *The Bilateral Agreement between the Swiss Confederation and the Federal Republic of Germany on double taxation*

11. On 11 August 1971 the Swiss Confederation and the Federal Republic of German concluded the abovementioned German-Swiss Bilateral Agreement, which entered into force on 29 December 1972.

12. Article 15a of the German-Swiss Bilateral Agreement concerns the taxation of frontier workers and paragraph 1 thereof provides that ’salaries, wages and other similar remuneration which a frontier worker obtains from employment may be taxed in the Contracting State in which he resides. By way of compensation, the Contracting State in which the work is carried out may deduct tax on that remuneration. That tax may not exceed 4.5% of the gross amount of the remuneration where residence has been demonstrated by an official certificate of the competent tax authority of the Contracting State in which the taxpayer resides. The provisions of Article 4(4) shall prevail.’

13. Article 4(4) of the German-Swiss Bilateral Agreement provides for a form of extended tax liability in favour of the Federal Republic of Germany. Under that provision, notwithstanding the other provisions of that Agreement, the Federal Republic of Germany may tax a natural person who is resident in Switzerland, but who is not a Swiss national and was subject to unlimited tax liability in Germany for a total of at least five years, on income originating in the Federal Republic of Germany and assets located in German territory. That power to tax can be exercised in the year in which the unlimited tax liability came to an end for the last time and in the following five years. Under the Bilateral Agreement, the taxation of such income and assets in Switzerland is not to be prejudiced. However, by analogous application of German legislation on the calculation of foreign taxes the Federal Republic of Germany credits the Swiss tax levied on that income or those assets in conformity with the Bilateral Agreement against the part of the German tax levied on that income or those assets.

C – *German law*

14. Under Paragraph 1(1) and (4) of the Law on income tax (Einkommensteuergesetz; ‘the EStG’),[4] natural persons who have their place of residence or their habitual residence in Germany are subject to unlimited income tax liability, whereas natural persons who do not have their place of residence or their habitual residence in Germany are subject to only limited income tax liability in so far as they receive income in Germany within the meaning of Paragraph 49 of the EStG.

15. Under Paragraph 49(1)(4)(a) of the EStG, income from employment performed in Germany constitutes income received in Germany.

4 — In the version published on 19 October 2002 (BGB1. 2002 I, p. 4212), as amended on 20 December 2007 (BGB1. 2007 I, p. 3150).

II – **Facts, national procedure and questions referred**

16. Mr Bukovansky, the applicant in the main proceedings, possesses German and Czech nationalities.

17. In the period prior to 2006 Mr Bukovansky worked in Switzerland for a number of companies belonging to a Swiss pharmaceuticals group. However, he resided in Germany, where he was subject to income tax.

18. In March 2006, Mr Bukovansky started working in Germany for a German subsidiary of that Swiss pharmaceuticals group and in June of that year became the manager (Geschaftsführer) of that subsidiary.

19. In August 2008, Mr Bukovansky, while continuing to work for that German subsidiary, transferred his place of residence to Basle in Switzerland. From that moment he therefore no longer had his place of residence or his place of habitual residence in Germany. It is established that he regularly returned to his place of residence, located in Switzerland, from his place of work in Germany.

20. In his tax return submitted to the German tax authorities in respect of 2008, Mr Bukovansky proceeded on the assumption that for the period from August to December of that year, that is to say, following his move to Switzerland, he had to be regarded as a (reverse) frontier worker within the meaning of Article 15a(1) of the German-Swiss Bilateral Agreement. He accordingly took the view that, under that provision, his income from employment was taxable, from August 2008, in the Contracting Party to that Agreement in which he resided, that is to say, Switzerland, taking account of the 4.5% gross income tax deduction made by his employer and paid in Germany pursuant to that provision of the Bilateral Agreement.

21. However, in its income tax assessment notice the Finanzamt Lörrach (Lörrach Tax Office) did not concur with Mr Bukovansky's view and subjected the income in question to German tax for the whole of the year at issue. The German tax authorities took the view that Mr Bukovansky was to be regarded as a person subject to limited income tax liability under Paragraph 1(4) of the EStG, in conjunction with Paragraph 49(1)(4)(a) thereof, but that his income had to be subject to German tax pursuant to the rule on extended tax liability laid down in Article 4(4) of the German-Swiss Bilateral Agreement.

22. Following an administrative appeal lodged by Mr Bukovansky, the amounts which he had paid to the Swiss tax authority by way of income tax were taken into account in the calculation of the income taxable in Germany.

23. By the action which he brought before the referring court, which is opposed by the Finanzamt Lörrach, Mr Bukovansky claims that, as from August 2008, his income from employment should have been subject solely to income tax in Switzerland since he is a reverse frontier worker. He submits that the conditions for applying to him the extended tax liability provided for under Article 4(4) of the German-Swiss Bilateral Agreement are not satisfied.

24. In its order for reference the Finanzgericht Baden-Württemberg is uncertain as to the compatibility of that provision of the German-Swiss Bilateral Agreement with certain provisions of the Agreement. The referring court considers, on the one hand, that the extended tax liability amounts to discriminatory tax treatment at variance with the principle of equal treatment laid down in Article 9 of Annex I to the Agreement and, as such, constitutes an obstacle to the exercise of free movement. On the other hand, in its view, Article 4(4) of the German-Swiss Bilateral Agreement may also be contrary to the prohibition of discrimination on grounds of nationality referred to in Article 2 of the Agreement.

25. The referring court takes the view that Article 21(1) of the Agreement does not preclude disapplication of the provision of the German-Swiss Bilateral Agreement concerning extended tax liability. Notwithstanding that article, the provisions of agreements on double taxation cannot be contrary to the obligations arising from the fundamental freedoms laid down in the Agreement, such as, in particular, the prohibition of discrimination.

26. In the light of those considerations, the national court deemed it necessary, by order of 19 December 2013, to stay the proceedings pending before it and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of the Agreement …, and in particular the preamble thereto, Articles 1, 2 and 21 thereof and Articles 7 and 9 of Annex I thereto, to be interpreted as meaning that a worker who has moved from Germany to Switzerland, who is not a Swiss national and who, since moving to Switzerland, has been a "reverse frontier worker" within the meaning of Article 15a(1) of the German-Swiss Bilateral Agreement cannot be made subject to tax by Germany pursuant to Article 4(4), in conjunction with the fourth sentence of Article 15a(1), of the German-Swiss Bilateral Agreement?'

III – **Procedure before the Court of Justice**

27. The order for reference was received at the Court Registry on 16 May 2014. Observations were submitted by Mr Bukovansky, the Finanzamt Lörrach, the Swedish, German and UK Governments and the Commission. Mr Bukovansky, the Finanzamt Lörrach, the German Government and the Commission made oral submissions at the hearing held on 26 February 2015.

IV – **Legal assessment**

28. By its question, the referring court asks, in essence, whether the relevant provisions of the Agreement must be interpreted as precluding a provision contained in a bilateral double taxation agreement concluded between the Swiss Confederation and a Member State which provides for a form of extended tax liability under which income generated in that Member State by an employee who is a 'reverse frontier worker' for the purposes of that Agreement, who has moved to Switzerland but is not a Swiss national, and who was subject to the income tax of the Member State in question for a total of at least five years before moving to Switzerland, can continue to be subject to the income tax of that Member State in the year in which he transferred his residence and in the five subsequent years.

A – *General observations*

29. Although the jurisdiction of the Court to interpret the Agreement is now beyond discussion,[5] the answer to the question referred by the national court presupposes that the Agreement applies to a situation such as that of Mr Bukovansky.

5 — See, for example, *Bergström* (C-257/10, EU:C:2011:839) and *Ettwein* (C-425/11, EU:C:2013:121).

30. In that regard, it should be observed that the fact that Mr Bukovansky is a German national and invokes rights under his freedom of movement against his Member State of origin, that is to say Germany, does not preclude application of the Agreement. Irrespective of the fact that Mr Bukovansky is also a Czech national, the Court has consistently held that it is possible for nationals of a Contracting Party also to assert rights under the Agreement against their own country, in certain circumstances and in accordance with the provisions applicable. [6]

31. With regard to the circumstances in the main proceedings and the provisions of the Agreement applicable in this case, it should be noted that, in the light of their wording, both Article 2 of the Agreement and Article 7(1) of Annex I thereto are applicable to the situation of Mr Bukovansky.

32. So far as concerns, firstly, the applicability of Article 2 of the Agreement, it should be noted that Mr Bukovansky is a national of a 'Contracting Party', that is to say, the Federal Republic of Germany, and is lawfully resident in another Contracting Party, that is to say, the Swiss Confederation. Under that article he therefore cannot be subject to any discrimination on grounds of nationality.

33. So far as concerns, secondly, the application of Article 7(1) of Annex I to the Agreement, it should be noted that Mr Bukovansky 'has his residence in the territory of a Contracting Party', in this case the Swiss Confederation, and pursues an activity as an employed person in 'the territory of the other Contracting Party', that is to say, the Federal Republic of Germany. Since it is common ground that he regularly returned from his place of employment to his place of residence during the period at issue, Mr Bukovansky must therefore be regarded as an 'employed frontier worker' within the meaning of Article 7(1) of Annex I to the Agreement. [7]

34. In the light of those considerations, it must be concluded that the situation of Mr Bukovansky comes within the scope of the Agreement.

B – *Relationship between the Agreement and the bilateral double taxation agreements*

35. Before considering the uncertainties raised by the referring court as to the compatibility of Article 4(4) of the German-Swiss Bilateral Agreement with the relevant provisions of the Agreement, it is necessary to examine, as a preliminary point, the relationship between the Agreement and bilateral double taxation agreements. To that end, it is necessary to determine the scope of Article 21(1) of the Agreement, according to which the provisions of bilateral agreements between Switzerland and the Member States of the European Union on double taxation 'shall be unaffected' by the provisions of the Agreement.

36. The positions put forward in the course of proceedings on this question, which, to my knowledge, has not yet been brought before the Court, differ widely.

37. On the one hand, the referring court takes the view that, notwithstanding the wording of Article 21(1) of the Agreement, in the event of conflict between the provisions of a bilateral double taxation agreement and those of the Agreement, the latter must prevail. In particular, it finds, the provisions of those agreements cannot be contrary to the prohibition of discrimination laid down in EU law.

6 — See *Bergström* (C-257/10, EU:C:2011:839, paragraphs 27 to 34) and *Ettwein* (C-425/11, EU:C:2013:121, paragraph 33).

7 — See, to that effect, as regards application of the notion of self-employed frontier worker within the meaning of Article 13 of Annex I to the Agreement, *Ettwein* (C-425/11 EU:C:2013:121, paragraphs 34 to 40).

38. Likewise, the Commission takes the view that Article 21(1) of the Agreement does not preclude a check on compliance of the German-Swiss Bilateral Agreement with the provisions of the Agreement. In the view of the Commission, that provision merely states that it is for the Contracting States to a bilateral double taxation agreement to decide on the scope and allocation of their powers of taxation. However, in accordance with the Court's case-law, when they define their methods of taxation they are required to respect the freedoms of movement as laid down in the Agreement.[8] Article 21(1) of the Agreement does not exempt them from that obligation.[9]

39. At the hearing the Commission also argued that if the exception referred to in Article 21(1) of the Agreement is to be interpreted as meaning that a Member State is free to incorporate into a bilateral double taxation agreement a provision which amounts to manifest discrimination or a manifest infringement of the freedoms guaranteed by the Agreement, the Agreement itself would be rendered entirely meaningless. The Commission therefore considers that the *ratio legis* and systematic interpretation of Article 21(1) of the Agreement militate against an interpretation according to which that provision lays down a general exception to the applicability of the Agreement in respect of all provisions contained in the bilateral double taxation agreements.

40. On the other hand, the position adopted by the Swedish Government, with which the German Government explicitly aligned itself at the hearing, is the diametric opposite. Those Governments take the view that Article 21(1) of the Agreement constitutes an unconditional exception to the application of the Agreement. It therefore follows, in their opinion, that neither the provisions of the Agreement nor the rights and obligations under EU law apply within the scope of that exemption. In other words, the provisions of the bilateral double taxation agreements apply as if the Agreement did not exist. Consequently, they submit, the rights and obligations thereunder cannot have any impact on the provisions contained in those bilateral agreements.

41. In concreto the two interpretations put forward as to the scope of Article 21(1) of the Agreement are liable to lead to different results in the present case. If the interpretation proposed by the referring court and the Commission were to be accepted, it would be necessary to examine whether the provision of the German-Swiss Bilateral Agreement which provides for extended tax liability is compatible with the relevant provisions of the Agreement. By contrast, if the interpretation proposed by the Swedish and German Governments were to be accepted, such an examination would not be necessary, and even in the event of incompatibility between the provision of the German-Swiss Bilateral Agreement at issue and the Agreement, the application of that provision would be unaffected.

42. It must first of all be pointed out that, as an international treaty, the Agreement must be interpreted, pursuant to Article 31 of the Vienna Convention on the law of treaties,[10] in good faith in accordance with the ordinary meaning to be given to the terms thereof in their context and in the light of its object and purpose.[11]

43. From the point of view of the literal analysis, it seems to me beyond doubt that, by using the terms 'shall be unaffected', the first sentence of Article 21(1) of the Agreement expressly lays down an exception to the applicability of that Agreement to the provisions of bilateral double taxation agreements concluded between Switzerland and the Member States of the European Union. It follows from the wording of that provision that the exception is general and unconditional in the sense that it

8 — The Commission refers to the established case-law cited in paragraphs 50 and 51 of the judgment in *Renneberg* (C-527/06, EU:C:2008:566).

9 — This would also appear to be the interpretation of Article 21(1) of the Agreement adopted by the Swiss Federal Court. See judgment of 26 January 2010 in Cases 2C_319/2009 and 2C_321/2009, paragraph 14.1. This judgment can be found on the following webpage: http://www.servat.unibe.ch/dfr//bger/100126_2C_319-2009.html (most recently consulted on 26 March 2015).

10 — Agreement signed in Vienna on 23 May 1969 (UN Treaty Series, vol. 1155, p. 331).

11 — See *Hengartner and Gasser* (Case C-70/09, EU:C:2010:430, paragraph 36 and the case-law cited).

is not subject to any condition other than that the provisions concerned must relate to double taxation. The second sentence of that paragraph relates to the specific question of the definition of 'frontier worker' but, as is evident from the use of the term 'in particular', is merely an illustrative example of the exception laid down in the first sentence and does not affect its general scope.

44. From the point of view of the contextual analysis, it should be observed that, in the Agreement, Article 21, entitled 'Relationship to bilateral agreements on double taxation', is followed by Article 22, which also contains a general provision concerning the relationship 'to bilateral agreements on matters other than social security and double taxation.'[12] Unlike Article 21(1) of the Agreement, Article 22 provides that the Agreement is not to prejudice bilateral agreements *not* relating to double taxation only 'in so far as they are compatible with [the] Agreement. Furthermore, Article 22(2) states explicitly that '[i]n the event of incompatibilities between such agreements and [the] Agreement, the latter shall prevail'.

45. It has to be noted that Article 21 of the Agreement contains no provision of the kind which explicitly confers prevalence on the Agreement over bilateral double taxation agreements.

46. In the light of the wording of the first sentence of paragraph 1 of Article 21 of the Agreement and the clear difference in wording between that provision and Article 22, I consider that it may legitimately be concluded that, had the Contracting Parties to the Agreement intended that it should prevail over the provisions of bilateral double taxation agreements, they would have stated this explicitly, as they did in Article 22 of the Agreement in respect of other types of bilateral agreements. Since they did not incorporate such a clause, the view might plausibly be taken that the intention was to lay down a general and unconditional exception to the scope of the Agreement in respect of provisions contained in bilateral double taxation agreements.[13]

47. Such an interpretation of Article 21(1) of the Agreement must, however, be examined in the light of other relevant provisions of the Agreement. In particular, although at the hearing the Commission acknowledged the differences in wording between Article 21 and Article 22 of the Agreement, it contended that the provision in Article 21(2) could be rendered meaningless if the interpretation of that provision proposed in point 46 above were accepted.

48. Under Article 21(2) of the Agreement, no provision thereof may be interpreted in such a way as to prohibit the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence. In that regard, in its judgment in *Ettwein*, cited above, the Court made it clear that that provision allows different treatment, in tax matters, of resident and non-resident taxpayers, but only where they are not in a comparable situation .[14]

49. Unlike the Commission, however, I take the view that paragraph 2 of Article 21 of the Agreement does not constitute a specification of paragraph 1 thereof. In that regard, it must be noted that paragraph 2 of Article 21 refers to the fiscal legislation of the Contracting Parties, whereas paragraph 1 thereof refers to bilateral agreements concluded between the Swiss Confederation and the Member States of the European Union.

12 — The relationship to bilateral social security agreements is governed by Article 20 of the Agreement, which provides that these are to be suspended on the entry into force of the Agreement, in so far as the latter covers the same subject-matter.

13 — It should be noted that it is clear from the first sentence of Article 21(1) of the Agreement that the scope *ratione temporis* of that exception is not limited to bilateral double taxation agreements already concluded at the time at which the Agreement entered into force, but also extends to agreements concluded subsequently.

14 — See *Ettwein* (C-425/11 EU:C:2013:121, paragraph 45).

50. In that respect, it has to be made clear that the exemption provided for in Article 21(1) of the Agreement does not authorise a Member State or the Swiss Confederation unilaterally to adopt discriminatory measures in their national legislation which would be contrary to the provisions of the Agreement. That provision merely leaves unaffected the possibility for a Member State and the Swiss Confederation to lay down, *by convention* in a bilateral double taxation agreement, fiscal measures which do not conform to the Agreement. Therefore, any provision incompatible with the Agreement will always have to be the result of an agreement between a Member State and the Swiss Confederation.

51. It is from this perspective that I do not concur with the Commission's argument that, if the interpretation of Article 21(1) of the Agreement proposed at point 46 above were accepted, the Agreement would be rendered completely meaningless. As has been made clear in the previous point, the scope of the exception, which, as such, must be interpreted restrictively,[15] is limited solely to conventional provisions of a fiscal nature contained in bilateral double taxation agreements. By contrast, it maintains its entire force in respect of any other type of provision.

52. It may also be noted in this regard that, whilst it is true, as is stated in the second sentence in the preamble to the Agreement, that the Contracting Parties thereto were '[r]esolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community',[16] the Court has emphasised that that desire to facilitate the free movement of persons between the European Union and the Swiss Confederation differs in spirit and purpose from the freedoms of movement laid down in the Treaties in the context of the internal market established between the Member States of the European Union. The Agreement therefore seeks to strengthen relations between the Contracting Parties, without any intention to extend the application of the fundamental freedoms *in toto* to the Swiss Confederation.[17]

53. The limitation of the scope of the case-law recalled by the Commission and mentioned at point 38 above, according to which, when they define their methods of taxation, the Member States are required to respect the freedoms of movement as laid down in the FEU Treaty, is understandable in the light of that characterisation of the Agreement, as set out by the Court.[18] That principle of EU law applies within the scope of the Agreement but there is an exception to it where the Contracting Parties have decided that the Agreement does not apply, that is to say, in respect of the conventional provisions relating to double taxation.

54. In conclusion, it follows from the foregoing considerations that, in my view, the question submitted by the referring court should be answered to the effect that, in the light of Article 21(1) of the Agreement, the latter does not preclude a provision such as that contained in Article 4(4) of the German-Swiss Bilateral Agreement.

55. It is therefore only in the event that the Court should decide not to accept the interpretation of Article 21(1) of the Agreement which I propose, and should thus consider it necessary to examine whether Article 4(4) of the German-Swiss Bilateral Agreement is compatible with the relevant provisions of the Agreement, that I will set out the following additional views.

15 — See, to that effect, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraph 24) and *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 52 and the case-law cited).

16 — See *Bergström* (C-257/10, EU:C:2011:839, paragraph 27).

17 — See, to that effect, *Grimme* (C-351/08, EU:C:2009:697, paragraphs 26 to 29).

18 — See also point 63 below.

C – *Compatibility with the Agreement of the provision laying down extended tax liability*

56. The referring court raises two grounds on which the extended tax liability provided for in Article 4(4) of the German-Swiss Bilateral Agreement may possibly be incompatible with the Agreement.

57. On the one hand, the referring court considers that the extended tax liability amounts to discriminatory tax treatment contrary to Article 9 of Annex I to the Agreement. Mr Bukovansky, it finds, is, vis-à-vis the Federal Republic of Germany, in a position comparable to that of a worker of Swiss nationality who works in Germany and moves to Switzerland. Mr Bukovansky can therefore invoke Article 9(2) of Annex I to the Agreement to seek to obtain the same tax concessions as those enjoyed by a Swiss worker in his position, by demanding therefore not to be subject to extended tax liability. That discriminatory tax treatment, in the view of the referring court, constitutes an obstacle to free movement in that it makes moving to Switzerland less attractive for employed workers who are not Swiss nationals and thereby impedes the objective of the continuous expansion of the freedom of movement pursued by the Agreement.

58. On the other hand, the referring court takes the view that Article 4(4) of the German-Swiss Bilateral Agreement is also contrary to the prohibition of discrimination on grounds of nationality laid down in Article 2 of the Agreement. It observes that the extension of income tax liability to the German level does not apply if the person moving to Switzerland has Swiss nationality. If Mr Bukovansky had had such nationality he would not have been subject, in the present case, to extended tax liability, even if his private and professional life had been identical.

59. In order to be able to respond to the uncertainties raised by the referring court, I consider it appropriate to recapitulate certain principles laid down by the Court concerning double taxation agreements and the fundamental freedoms guaranteed by the FEU Treaty.

60. In this regard, it should be borne in mind, first of all, that it is settled case-law that the Member States retain the power to define, by agreement or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation, where appropriate by means of agreements.[19] It is for the Member States to take the measures necessary to prevent situations of double taxation by applying, in particular, the criteria followed in international tax practice.[20]

61. In that context, the Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction within the framework of bilateral agreements for the avoidance of double taxation.[21] The fact that the States which are contracting parties to a bilateral double taxation agreement have chosen such connecting factors does not in itself constitute discrimination contrary to the fundamental freedoms provided for in the FEU Treaty.[22]

19 — See, in particular, *Saint-Gobain ZN* (C-307/97, EU:C:1999:438, paragraph 57); *de Groot* (C-385/00, EU:C:2002:750, paragraph 93); *Bouanich* (C-265/04, EU:C:2006:51, paragraph 49); *Renneberg* (C-527/06, EU:C:2008:566, paragraph 48); and *Beker* (C-168/11, EU:C:2013:117, paragraph 32).

20 — *Damseaux* (C-128/08, EU:C:2009:471, paragraph 30 and the case-law cited).

21 — See, inter alia, *de Groot* (C-385/00, EU:C:2002:750, paragraph 94); *Renneberg* (C-527/06, EU:C:2008:566, paragraph 48); and *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 42).

22 — See *Gilly* (C-336/96, EU:C:1998:221, paragraph 53).

62. Furthermore, it follows from the case-law, on the one hand, that the Member States can agree that a taxpayer is to be taxed in both Member States and, on the other, that the disadvantages which could arise from the parallel exercise of powers of taxation by different Member States, in so far as such an exercise is not discriminatory, do not constitute restrictions prohibited by the FEU Treaty.[23] Consequently, a Member State is not obliged, under EU law, to prevent the disadvantages which might arise from the parallel exercise of powers of taxation.[24]

63. However, it also follows from settled case-law that the allocation of powers of taxation between the Member States does not allow them to apply measures that are contrary to the freedoms of movement guaranteed by the FEU Treaty.[25] In particular, in exercising the power of taxation allocated by bilateral agreements to prevent double taxation, the Member States must comply with EU rules and, more particularly, respect the principle of national treatment in regard to nationals of other Member States and in regard to their own nationals who have exercised the freedoms guaranteed by the Treaty.[26]

64. It is in the light of those principles, all of which may be inferred, directly or indirectly, from the case-law before the Agreement entered into force,[27] that the uncertainties raised by the referring court must be examined.

1. The breach of Article 9(1) of Annex I to the Agreement and the obstacle to freedom of movement

65. The referring court bases its assessment expressly on the case-law of the Court according to which the freedom of movement for persons which, according to the second sentence in the preamble to the Agreement, the Contracting Parties are resolved to bring about between them on the basis of the rules applying in the European Union, would be impeded if a national of a Contracting Party were to be placed at a disadvantage in his country of origin for the sole reason that he or she has exercised the right of movement.[28]

66. However, it must be held that, as various intervening parties have observed, there is in fact nothing in the case-file to indicate that the provision laying down the extended tax liability entails less favourable tax treatment in the country of origin, that is to say, Germany, for a person such as Mr Bukovansky, who has exercised his right of movement by moving to Switzerland. For a person in Mr Bukovansky's situation the application of the extended tax liability merely involves the application, for the current year and the five years following his move, of the same rate of tax as that applied to a worker in the same situation who is resident in Germany. In other words, under this provision Mr Bukovansky does not enjoy more favourable tax treatment in Switzerland following his move there, but continues to be subject to the rate of tax to which he was subject in Germany.

67. In my view, a provision such as that contained in Article 4(4) of the German-Swiss Bilateral Agreement does nothing more than reflect the terms of the agreement reached between the Federal Republic of Germany and the Swiss Confederation on the allocation of powers of taxation between those States. Under Article 15a of that Agreement, the two States in question agreed that in the case of a reverse frontier worker, such as Mr Bukovansky, powers of taxation should lie with the State of residence, in this case Switzerland. However, under Article 4(4) of that Agreement, in the case of a non-Swiss national who has been subject to unlimited tax liability for at least five years in Germany and continues to generate income in Germany, the Federal Republic of Germany maintains the power of taxation for a set period at the rate of tax provided for in respect of income tax.

23 — *Damseaux* (C-128/08, EU:C:2009:471, paragraphs 27 and 34).

24 — *Damseaux* (C-128/08, EU:C:2009:471, paragraph 34); *CIBA* (C-96/08, EU:C:2010:185, paragraphs 27 and 28); and *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2009:17, paragraph 170).

25 — See *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 42 and the case-law cited).

26 — See *de Groot* (C-385/00, EU:C:2002:750, paragraph 94) and *Renneberg* (C-527/06, EU:C:2008:566, paragraph 51).

27 — See Article 16(2) of the Agreement and point 6 above.

28 — Case *Bergström* (C-257/10, EU:C:2011:839, paragraphs 27 and 28) and *Ettwein* (C-425/11, EU:C:2013:121, paragraph 51).

68. In that regard, first, the criterion relating to prior residence,[29] which under the provision at issue justifies application of the extended tax liability, constitutes a legitimate connecting factor for the allocation of powers of taxation between the Member States.

69. Second, it follows from the case-law cited in points 61 and 63 above that, while, in applying those criteria, the Member States must guarantee respect for the principle of national treatment in regard to their own nationals who have exercised the freedoms guaranteed by the Treaty — which, as is clear from point 66 above, would appear to be the case here —, they are not obliged, under EU law, to prevent the disadvantages which might result from the parallel exercise of taxation powers.

70. On the contrary, in its judgment in *Weigel*[30] the Court stated quite specifically that EU law offers no guarantee to a worker that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation. Given the disparities in the legislation of the Member States in this area, such a transfer may, or may not, operate to that worker's advantage. It follows that, in principle, any disadvantage, by comparison with the situation in which the worker pursued his activities prior to the transfer, will not be contrary to Article 45 TFEU if that legislation does not place that worker at a disadvantage in comparison with those who were already subject to it.[31]

71. It thus follows from the case-law that, contrary to what the referring court asserts, the Federal Republic of Germany is not obliged to guarantee a worker in Mr Bukovansky's situation the same treatment as that reserved to a worker of Swiss nationality who works in Germany and transfers his residence to Switzerland and who, under the German-Swiss Bilateral Agreement, is subject to tax in Switzerland. The difference in treatment between such a Swiss worker and Mr Bukovansky is merely the result of the allocation of powers of taxation between the Contracting States. Since there is nothing to indicate that the extended tax liability gives rise to different treatment vis-à-vis a worker resident in Germany and subject to unlimited tax liability there, the necessary conclusion is that such tax treatment does not constitute an obstacle to freedom of movement.[32]

72. Next, as regards, in particular, the referring court's reference to Article 9 of Annex I to the Agreement, it should first be recalled that the Court has made it clear that paragraph 1 of that article concerns only the case of discrimination on grounds of nationality against a national of a Contracting Party in the territory of another Contracting Party.[33]

73. It follows from the facts placed before the Court that Mr Bukovansky is a German national who carried out his activity in Germany for a German company in the year at issue, namely 2008. The fact that that German company is a subsidiary of a Swiss group has no relevance in that respect. Therefore, there can be no question in the present case of discrimination by the authorities of a Contracting Party against a national of another Contracting Party, and thus the provision in question cannot apply.

74. As regards, secondly, Article 9(2) of Annex I, it should be recalled that this provides that an employed person and the members of his family are to enjoy the same tax concessions and welfare benefits as national employed persons and members of their family. However, I consider that that provision, like Article 9(1), also concerns discrimination on grounds of nationality against a national of a Contracting Party in the territory of another Contracting Party, which does not apply in the present case, as noted in the preceding point.

29 — Note that in German law the residence criterion justifies unlimited income tax liability. See point 14 above.

30 — *Weigel* (C-387/01, EU:C:2004:256).

31 — See *Weigel* (C-387/01, EU:C:2004:256, paragraph 55). The fact that that case related to indirect taxes, namely a vehicle registration fee, is of no relevance for the purpose of applying the principle laid down therein.

32 — Nor is the principle expressed in paragraph 79 of the judgment in *de Groot* (C-385/00, EU:C:2002:750), according to which the rules on freedom of movement for workers preclude the State of origin from obstructing the freedom of one of its nationals to accept and carry out work in another Member State, applicable in the present case. Mr Bukovansky does not carry out any work in Switzerland.

33 — See *Grimme* (C-351/08, EU:C:2009:697, paragraphs 47 and 48).

75. That interpretation is confirmed, from a literal point of view, by the wording of certain language versions of the provision which contain a clear reference to the 'territory of the other Contracting Party' mentioned in paragraph 1 of that article.[34] It is also consistent with the principle of law laid down in the case-law cited in point 63 above, according to which Member States are required to respect the principle of national treatment in regard to nationals of other Member States who have exercised their freedom of movement.

76. Moreover, it follows from that same case-law that Member States are also required to respect the principle of national treatment in regard to their own nationals who have exercised their freedom of movement. It is in keeping with that case-law that the Court referred in its judgment in *Ettwein* to, inter alia, Article 9(2) of Annex I to the Agreement in order to establish the principle that the Contracting Parties cannot deny a taxpayer a tax concession on the sole ground that his place of residence is located in the territory of the other Contracting Party.[35] However, that case-law is not applicable to the present case since it does not involve the recognition of a tax concession in Germany to a German worker resident in Switzerland but who works in Germany, but rather concerns the recognition of privileged Swiss tax treatment by reason of residence in Switzerland in comparison with a German worker/taxpayer resident in Germany and there subject to income tax.

77. It follows from the foregoing that, should the Court decide to assess it in the light of the Agreement, Article 4(4) of the German-Swiss Bilateral Agreement does not constitute either a breach of Article 9 of Annex I to the Agreement or an obstacle to the free movement of workers.

2. The breach of Article 2 of the Agreement

78. The referring court takes the view that the extended tax liability constitutes a provision contrary to the prohibition of discrimination on grounds of nationality and at variance with Article 2 of the Agreement. Since that tax treatment does not apply to Swiss nationals who move to Switzerland, the application of Article 4(4) of the German-Swiss Bilateral Agreement means that the tax burden for a non-Swiss national who moves to Switzerland is higher than for a Swiss national.

79. However, as already explained at point 67 above, the provision in question constitutes an agreement on the allocation of powers of taxation between the Contracting States to the Bilateral Agreement.

80. In that regard, it should be observed, firstly, that it follows from the Court's case-law that the criterion of nationality may be used as a criterion for allocating powers of taxation and must not be regarded, as such, as amounting to discrimination on grounds of nationality.[36]

81. Secondly, the Court has already held, in its judgment in *van Hilten-van der Heijden*,[37] that a provision of national law which provides for a form of extended tax liability, in that case in respect of inheritance tax, and which uses the connecting criterion of nationality for the purpose of allocating powers of taxation, cannot be regarded as constituting discrimination prohibited by the Treaty.[38]

34 — Thus, for example, in the French version ('Le travailleur salarié et les membres de sa famille visés […] *y* bénéficient des mêmes avantages fiscaux et sociaux que les travailleurs salariés nationaux et les membres de leur famille') the term 'y' can refer only to the territory of the Contracting Party. The same applies in the case of the term 'dort' in the German version ('Ein Arbeitnehmer und seine […] Familienangehörigen genießen *dort* die gleichen steuerlichen und sozialen Vergünstigungen wie die inländischen Arbeitnehmer und ihre Familienangehörigen').

35 — *Ettwein* (C-425/11, EU:C:2013:121, paragraphs 48, 49 and 52).

36 — See *Gilly* (C-336/96, EU:C:1998:221, paragraphs 30 and 53).

37 — *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131).

38 — Ibid., paragraph 47.

82. Consequently, in the light of those considerations, it must, in my view, be concluded that the provision at issue does not give rise to any form of discrimination on grounds of nationality which is contrary to Article 2 of the Agreement.

V – **Conclusion**

83. On the basis of the foregoing considerations, I propose that the Court reply as follows to the question referred by the Finanzgericht Baden-Württemberg:

The Agreement 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 must, by reason of Article 21(1) thereof, be interpreted as not precluding a provision contained in a bilateral agreement on double taxation concluded between the Swiss Confederation and a Member State which provides for a form of extended tax liability under which income generated in that Member State by an employed person who may be classified as a 'reverse' frontier worker under the Agreement, who has moved to Switzerland but is not a Swiss national and who was subject for a total of at least five years before moving to Switzerland to the income tax of the Member State in question, can continue to be subject to the income tax of that Member State in the year in which the move took place and in the five subsequent years.