JUDGMENT OF THE COURT (Second Chamber)

10 September 2009*

In Case C-269/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 June 2007,

Commission of the European Communities, represented by R. Lyal and W. Mölls, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by C. Blaschke and M. Lumma, acting as Agents, assisted by D. Wellisch, Rechtsanwalt, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, K. Schiemann, J. Makarczyk, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2008,

after hearing the Opinion of the Advocate General at the sitting on 31 March 2009

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by introducing and maintaining the provisions for complementary pensions in Paragraphs 79 to 99 of the Federal Law on Income Tax (Einkommensteuergesetz; 'the EStG'), the Federal Republic of Germany has failed to fulfil its obligations under Article 39 EC and Article 7 of Regulation (EEC) No 1612/68 of the

Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) and under Articles 12 EC and 18 EC, in so far as those provisions:

— deny cross-border workers (and their spouses) the right to a bonus, unless they are fully liable to tax in that Member State;

— do not permit the subsidised capital to be used for an owner-occupied dwelling, unless that dwelling is in Germany, and

— require the repayment of the subsidy on termination of full liability to tax.

Legal context

Community legislation

2 Article 7(1) and (2) of Regulation No 1612/68 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

National legislation

3 Paragraph 1 of the EStG is worded as follows:

'(1) Natural persons having their domicile or habitual residence in Germany shall be fully liable to income tax. …

…

(3) At their request, natural persons having neither their domicile nor habitual residence in Germany may also be fully liable to income tax in so far as they receive income arising in Germany within the meaning of Paragraph 49. This option applies only if at least 90% of their income during a calendar year is subject to German income tax or if their income not subject to German income tax does not exceed EUR 6 136 a calendar year. …

…'

4 Paragraph 10a(1) of the EStG provides that persons insured under the statutory pension insurance scheme may deduct annually as special expenses, up to a certain threshold, their savings-pension contributions together with the savings-pension bonus granted

pursuant to Paragraph 79 et seq. Paragraph 10(a)(1) of the EStG also provides that, in addition to persons insured under the statutory pension insurance scheme, other categories of persons are to benefit from those deduction rules. Paragraph 10(a)(2) of the EStG sets out the relationship between the deduction as special expenses of savings-pension contributions and the grant of the bonus referred to in Paragraph 79 of the EStG and provides that the regime which is more advantageous for the taxpayer must be applied.

5 Paragraph 79 of the EStG, entitled 'Beneficiaries of the bonus', provides:

'Taxpayers who are fully liable to income tax and are beneficiaries pursuant to Paragraph 10a(1) are entitled to a savings-pension bonus (bonus). In the case of married couples who fulfil the conditions under Paragraph 26(1) and where only one spouse is a beneficiary under the first sentence, the other spouse may also obtain the bonus if there is a savings-pension contract in their name.'

6 According to Paragraph 83 of the EStG, entitled 'Savings-pension bonus', a bonus which consists of a basic bonus and a supplement for children is granted in accordance with contributions made to the savings-pension.

7 Paragraph 84 of the EStG states the amount of the basic bonus which each beneficiary may claim.

8 Paragraph 85 of the EStG states the additional amount which the beneficiary of the basic bonus may claim for children in respect of which he receives family allowances.

9 According to Paragraph 92a of the EStG, entitled 'Use for an owner-occupied dwelling':

'(1) The beneficiary of the bonus may use directly at least EUR 10 000 of the capital built up under a savings-pension contract and subsidised under Paragraph 10a or of this section for the purchase or construction of an owner-occupied dwelling in the Federal Republic of Germany, or of an apartment in the national territory (savings-pension amount in respect of owner-occupied dwelling). The maximum amount which may be used pursuant to the first sentence is EUR 50 000.

…'

10 Paragraph 93 of the EStG, entitled 'Prejudicial use', provides that in the event of the prejudicial use of the subsidised capital of the savings-pension, the beneficiary must reimburse the bonuses received together with the sums deducted as special expenses pursuant to Paragraph 10a of the EStG. Paragraph 94 of the EStG establishes the procedure applicable in the event of prejudicial use.

11 Paragraph 95 of the EStG, entitled 'Termination of the bonus beneficiary's full liability to income tax', provides:

'(1) Paragraphs 93 and 94 of the EStG shall apply *mutatis mutandis* where the beneficiary is no longer domiciled or habitually resident in Germany and is therefore no longer fully liable to tax, or a request has not been made pursuant to Paragraph 1(3) of the EStG.

(2) On the request of the beneficiary the reimbursement of the sum in question (Paragraph 93(1), first sentence) shall initially be postponed to the beginning of the payment stage (Paragraph 1(1)(2) of the Law on Certification of Savings-pension Contracts (Altersvorsorgeverträge-Zertifizierungsgesetz)). The moratorium shall be extended provided at least 15% of the payments under the savings-pension contract are used for the purposes of reimbursement. Default interest shall not be charged. …

(3) In the cases provided for in Paragraph 95(1), if full liability to tax again applies or the request provided for in Paragraph 1(3) has been made, the central body shall release the amount to be reimbursed which was subject to a moratorium. …'

Pre-litigation procedure

12 Taking the view that the provisions for complementary pensions in Paragraphs 79 to 99 of the EStG did not comply with Community law, the Commission sent a letter of formal notice to the Federal Republic of Germany on 16 December 2003, to which the latter replied by letter of 19 February 2004. It disputed any infringement of Community law.

13 By letter of 19 December 2005, the Commission sent the Federal Republic of Germany a reasoned opinion calling on it to take the measures necessary to comply therewith within a period of two months of its receipt. That Member State replied to the reasoned opinion by letter of 20 February 2006.

14 Being dissatisfied with the German authorities' reply, on 1 June 2007 the Commission decided to bring the present action.

The action

15 The Commission's action is based on three complaints. By its first complaint, the Commission submits that the German legislation, in so far as it denies cross-border workers who are not fully liable to German tax the right to the bonus, constitutes indirect discrimination on the basis of nationality incompatible with Article 39 EC and Article 7(2) of Regulation No 1612/68. According to its second complaint, the prohibition on using the subsidised capital for the acquisition or construction of an owner-occupied dwelling unless the dwelling is situated in the Federal Republic of Germany constitutes indirect discrimination on the basis of nationality incompatible with Article 39 EC and Article 7(2) of Regulation No 1612/68. By its third complaint, the Commission claims that the obligation to reimburse on termination of full liability to taxation is contrary to Articles 12 EC, 18 EC and 39 EC as well as Article 7(2) of Regulation No 1612/68.

The first complaint

Arguments of the parties

16 The Commission claims that the requirement pursuant to Paragraph 79 of the EStG that a person be fully liable to tax in Germany in order to benefit from the savings-pension bonus constitutes disguised discrimination on the basis of nationality and is thus contrary to Article 39 EC and Article 7(2) of Regulation No 1612/68.

17 The Commission considers essentially that, according to the Court's case-law, the savings-pension bonus is a social advantage pursuant to Article 7(2) of Regulation No 1612/68. The savings-pension bonus is 'generally' granted to individuals on the basis of their objective status as workers. Since savings-pension contracts were introduced with the aim of supplementing individuals' statutory pensions, the level of which has

been reduced, that bonus thus seeks to provide support for payment of contributions and, accordingly, to assist individuals in building up a complementary pension throughout their working lives.

18 In any event the concept of social advantage covers, in accordance with the Court's case-law, advantages granted as a result of a beneficiary's residence on the territory of the Member State which grants that advantage. That is the case here. That approach taken in the case-law is explained by the purpose of Article 7 of Regulation No 1612/68 which is to facilitate mobility within the European Community. The grant of benefits to the inhabitants of a Member State can have repercussions for the attractiveness of the labour market of that Member State and, accordingly, is likely to encourage mobility. According to the Commission, cross-border workers are, with respect to the provisions concerning preparation for retirement, in the same position as workers who reside in Germany and are equally concerned by the reduction in the level of the German statutory pension scheme to which they pay contributions. However, Paragraph 79 of the EStG differentiates between those two categories of workers since the grant of the savings-pension bonus is subject to the condition that its beneficiary be fully liable to German tax. That condition of full liability is, pursuant to Paragraph 1 of the EStG, equivalent to a condition of residence on the national territory and, consequently, its application denies cross-border workers the benefit of that bonus.

19 The Commission notes that cross-border workers, who, for the most part, are not German nationals and whose income is taxable in their State of residence pursuant to bilateral conventions to prevent double taxation concluded by the Federal Republic of Germany inter alia with the French Republic and the Republic of Austria, are not treated as fully-liable taxpayers. Consequently, they may not benefit from the savings-pension bonus in question and are victims of disguised discrimination on the basis of nationality. The Commission states in this respect that cross-border workers may not ask to be treated as persons who are fully liable to income tax under Paragraph 1(3) of the EStG, since, pursuant to the abovementioned conventions, the taxation of their income received in Germany has been attributed exclusively to another Member State.

20 As regards the Federal Republic of Germany's argument that the savings-pension contracts are voluntary, which means that the bonus in question cannot be regarded as a social advantage, the Commission states that the classification of that bonus as a social advantage does not depend on whether it is part of an obligatory or voluntary system. The Commission adds that a voluntary system may also contribute towards complementing an obligatory insurance system, which is precisely the case here.

21 The Commission explains that the considerations on which the allegation of discrimination is based are relevant irrespective of whether the bonus is classified as a 'social' or 'tax' advantage, since the decisive factor in both cases is that the situation of German workers, just like that of cross-border workers, is characterised by their affiliation to the statutory pension scheme and by the future evolution of pensions under that scheme. It states that according to the rationale of the judgment in Case C-279/93 *Schumacker* [1995] ECR I-225, cross-border workers should be assimilated to rather than distinguished from resident workers. Since those cross-border workers are compulsorily affiliated to the German statutory pension scheme on the basis of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416.), it is that scheme which must be used as the relevant criterion and not the tax status of the persons concerned.

22 Referring to Case C-80/94 *Wielockx* [1995] ECR I-2493, and in particular Article 21(1) of the Model Double Taxation Treaty of the Organisation for Economic Cooperation and Development (OECD) on income and on capital (Report of the Tax Affairs Committee of the OECD, 1977), the Commission submits that the Federal Republic of Germany's argument concerning fiscal cohesion is not relevant. A Member State may not rely on such an argument where it has itself signed up to a double taxation agreement whereby it may indeed tax pensions received from abroad by persons residing on its national territory, but may not tax national pensions received by persons residing abroad.

23 In addition, the Commission submits that in accordance with Paragraph 85 of the EStG, the bonus for children is a social advantage which must also be accorded without

discrimination, so that making the benefit of that advantage subject to the requirement that the taxpayer be fully liable to tax also infringes Article 39(2) EC and Article 7(2) of Regulation No 1612/68.

24 Lastly, referring to settled case-law, and, in particular Case 32/75 *Cristini* [1975] ECR 1085; Case C-3/90 *Bernini* [1992] ECR I-1071, and Case C-337/97 *Meeusen* [1999] ECR I-3289, the Commission asserts that the derived savings-pension bonus granted to the spouse of a beneficiary pursuant to Paragraph 79 of the EStG is also contrary to Article 39(2) EC and Article 7(2) of Regulation No 1612/68. The requirement that the spouse reside on the national territory results in a disguised restriction on the basis of nationality since, in the case of cross-border workers, who are not generally nationals of the State in which they exercise their professional activity, family members are usually domiciled in the worker's State of residence.

25 The Federal Republic of Germany disputes that the requirement of being fully liable to German tax, provided for in Paragraph 79 of the EStG, constitutes an infringement of Article 39 EC and Article 7(2) of Regulation No 1612/68.

26 That Member State submits that the savings-pension bonus is not a social advantage pursuant to Article 7(2) of Regulation No 1612/68 but a tax advantage.

27 The grant of that bonus in question is not linked to the beneficiary's objective status as a worker. It is apparent from Paragraph 10a(1) of the EStG, to which Paragraph 79 of the EStG refers, that, first, the right to the bonus does not depend exclusively on the person concerned being a worker for the purposes of Community law, second, that advantage also extends to self-employed persons and, third, quite a large group of workers is required to adhere to an occupational pension scheme specific to their profession, such

as doctors, and are unable to benefit from the deduction of special expenses pursuant to Paragraph 10a of the EStG.

28 Similarly, the grant of the bonus is not conditional on residence on the national territory. The liability to obligatory insurance referred to in Paragraph 10a of the EStG is linked to the place of employment and not to residence, as can be seen from Article 13(2)(c) of Regulation No 1408/71.

29 Unlike in the case of statutory social security systems characterised by compulsory payments, the necessary requirement in order to benefit from the bonus in question is that a savings-pension contract be voluntarily concluded with a private insurer.

30 The Federal Republic of Germany adds that, contrary to the Commission's claims, definitive conclusions on the legal classification of the measure cannot be drawn from the legislature's statement of reasons for it. In order to encourage the establishment of complementary private pensions, the German legislature clearly opted for a tax-based approach, even if it was guided by social considerations.

31 According to the Federal Republic of Germany, the savings-pension bonus is a tax advantage pursuant to Article 7(2) of Regulation No 1612/68. On the one hand, as regards the right to that bonus, Paragraph 79 of the EStG refers to Paragraph 10a(1) of the EStG and that, on the other hand, entitlement to that bonus depends on the ability to deduct special expenses pursuant to Paragraph 10(a) of the EStG; that paragraph is the key provision of that standard mechanism of tax law. The close link between the deduction of special expenses and the savings-pension bonus is evident not only from the references contained in the legislative text, but also from the fact that that bonus is an advance on a tax reduction.

32 The Federal Republic of Germany, referring to *Schumacker*, submits that there is no difference in treatment which is prohibited by Community law since the situations of residents and non-residents are generally not comparable in relation to direct taxes, because the income received in the territory of a State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode.

33 Accordingly, the Federal Republic of Germany submits that it is in principle the State of residence and not the State of employment which is required to take into consideration the personal situation of the non-resident worker. In that regard, it states, referring to Case C-391/97 *Gschwind* [1999] ECR I-5451, that, if a cross-border worker receives over 90% of his income in Germany, he may, in accordance with Paragraph 1(3) of the EStG, ask to be treated in Germany in the same way as a taxpayer who is fully liable to tax in that State and is therefore entitled to deduct special expenses. In the absence of any power to impose tax, the Federal Republic of Germany is not required to grant cross-border workers, whose income is taxed exclusively in the State of residence, a tax advantage aimed at encouraging the setting-up of a complementary pension.

34 The Federal Republic of Germany also claims that the national provisions at issue do not contain any prohibited discrimination, even in the light of the criteria established by the Court in relation to the grant of social advantages. The German legislature's aim is to enable persons who have a sufficiently close connection with German society within the meaning of Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 28, to benefit from incentives to set up individual savings-pensions, without strictly requiring that the advantages in question be subject to a residence requirement on the national territory. The Federal Republic of Germany considers that those cross-border workers whose situation is regulated by bilateral conventions to prevent double taxation do not have such a connection but are integrally linked, from a legal perspective, to their State of residence.

35 Next, as regards the bonus granted to spouses, the Federal Republic of Germany also disputes that it amounts to prohibited unequal treatment since a spouse who does not reside in Germany may also ask to be treated in the same way as taxpayers who are fully liable to tax in Germany provided that 90% of the spouses' common income is taxed in that State or that the spouses' income taxed abroad does not exceed EUR 12 272.

36 Lastly, in the alternative, the Federal Republic of Germany puts forward fiscal coherence as justification. The advantage procured by the savings-pension bonus pursuant to Paragraph 79 of the EStG and by the deduction of special expenses pursuant to Paragraph 10a of that law is counter-balanced by the taxation at a later stage of payments from the savings-pension contracts pursuant to Paragraph 22(5) of the EStG.

Findings of the Court

37 It should be noted first of all that this complaint relates solely to the situation of cross-border workers whose income is taxable exclusively in their State of residence pursuant to a convention to prevent double taxation concluded by the Federal Republic of Germany with other Member States. Next, it should be pointed out that the Commission seeks a declaration from the Court that there has been a failure to fulfil obligations in the light of the grant, by the German State, of the savings-pension bonus provided for in Paragraph 79 of the EStG and not in the light of the possibility of a tax deduction under Paragraph 10a(1) of the EStG for contributions to savings-pensions funds. Lastly, it should be borne in mind that, by this complaint, the Commission is referring not only to the grant of the disputed bonus to workers, but also the supplement for children and the derived bonus granted to the beneficiary's spouse.

38 As regards, in the first place, the grant of the savings-pension bonus to workers, the Commission and the Federal Republic of Germany disagree on whether that bonus

should be classified as a social advantage or as a tax advantage pursuant to Article 7(2) of Regulation No 1612/68.

39 According to settled case-law, the concept of social advantage covers all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their ordinary residence on the national territory, and the extension of which to migrant workers therefore seems likely to facilitate their mobility within the Community (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 25, and Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 48). It is noteworthy in this respect that the Court has already held that the term 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 includes income guaranteed to elderly people by the legislation of a Member State (see Case 261/83 *Castelli* [1984] ECR 3199, paragraph 11, and Case 157/84 *Frascogna* [1985] ECR 1739, paragraph 22).

40 In order to be able to classify the savings-pension bonus as a social or tax advantage, it is necessary to examine, as the Advocate General states at point 40 of his Opinion, its purpose and the conditions on which it is granted.

41 It is apparent from the documents before the Court that the saving-pensions bonus is motivated by social considerations. It was created to compensate for the future reduction in the level of the statutory pension and, to that end, constitutes financial aid designed to encourage the persons concerned to build up a complementary pension throughout their working lives.

42 Pursuant to Paragraph 10a of the EStG, to which Paragraph 79 of the EStG refers, that bonus is granted principally to salaried workers who are insured under the statutory pension insurance scheme, since they are most affected by the reduction in the level of the statutory pension. It should also be noted that that bonus is granted independently of the beneficiary's income and that its amount depends both on the contributions made under the savings-pension contract and on the number of children for whom the

beneficiary receives family allowances. In addition, the right to the bonus arises on expiry of the calendar year during which the contributions were made.

43 The grant of the savings-pension bonus is consequently a social advantage generally granted to workers on the basis of their objective status as workers.

44 None of the arguments advanced by the Federal Republic of Germany is capable of calling that finding into question.

45 The fact — which is not contested — that, pursuant to Paragraph 10a of the EStG, the bonus also benefits other persons not having the status of worker within the meaning of Community law does not mean that that advantage is not of a social nature, since the concept of social advantage does not require a link with a contract of employment, as is apparent from paragraph 39 of this judgment.

46 The fact that other categories of persons, who, although not workers, benefit from the bonus, demonstrates that the social objective pursued in relation to salaried workers has been extended to other categories of persons in a similar situation with regard to the statutory pension scheme.

47 The fact, put forward by the Federal Republic of Germany, that the conclusion of a savings-pension contract with a private provider and the resultant payment of contributions to that savings-pension are voluntary is not capable of affecting the classification of the bonus as a social advantage, since that classification does not depend on the obligatory nature of the scheme which grants that advantage.

48 The Federal Republic of Germany's argument, that the savings-pension bonus is a tax advantage on the ground that it is an advance on the tax saving resulting from the application of Paragraph 10a of the EStG cannot be accepted.

49 The object of this complaint does not relate to the possibility of deducting contributions to savings pensions together with the special expenses bonus, deductions which are referred to in Paragraph 10a of the EStG, but to the savings-pension bonus provided for in Paragraph 79 of the EStG which is a positive benefit granted by the German State, leaving aside any possibility of deduction. That bonus constitutes a minimum aid aimed at encouraging the setting-up of a complementary pension irrespective of the beneficiary's income and becomes part of the capital of the savings-pension.

50 The possibility of deducting contributions to the savings-pension is a separate advantage which, in certain circumstances, makes it possible to achieve an additional saving corresponding to the difference between the amount of the bonus and the amount of the saving resulting from the deduction made pursuant to Paragraph 10a of the EStG. That possibility of deducting payments pursuant to Paragraph 10a of the EStG is not therefore capable of altering the social nature of the savings-pensions bonus.

51 It is now necessary to ascertain whether making the grant of the savings-pension bonus, as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, subject to the condition that a worker be fully liable to German tax constitutes discrimination within the meaning of Community law.

52 In this respect, it should be borne in mind that Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers. According to settled case-law, cross-border workers may rely on the provisions of

Article 7 of Regulation No 1612/68 on the same basis as any other worker to whom that article applies (*Geven*, paragraph 15).

53 According to the Court's settled case-law, the equal treatment rule laid down both in Article 39 EC and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, in particular, Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44, and Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 37).

54 Unless it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (*Meints*, paragraph 45, and *Commission* v *France*, paragraph 38).

55 It must be stated that, in the present case, pursuant to Paragraph 79 of the EStG, the grant of the savings-pension bonus is conditional on full liability to German tax. Natural persons are fully liable to German tax where, according to Paragraph 1(1) of the EStG, they have their domicile or habitual residence in Germany or, according to Paragraph 1(3) thereof, they make a request to that effect and satisfy the strict conditions laid down in that provision.

56 In the present case, the workers concerned by this complaint are cross-border workers whose income is taxed exclusively in their State of residence pursuant to bilateral conventions to prevent double taxation concluded by the Federal Republic of Germany. Consequently, those workers do not have the possibility of being treated in the same way as fully-liable taxpayers, in accordance with Paragraph 1(3) of the EStG, which the

defendant State moreover recognises. In those circumstances, the requirement of being fully liable to German tax amounts to a residence requirement.

57 Consequently, the cross-border workers in question, who, by definition, have their residence in another Member State, are denied the benefit of the savings-pension bonus.

58 It should also be pointed out that those cross-border workers are most frequently non-nationals, and therefore workers of German nationality satisfy more easily the requirement of full liability to German tax than the cross-border workers concerned; the Federal Republic of Germany does not moreover contest this.

59 Accordingly, making the grant of the savings-pension bonus subject to a condition amounting to a residence requirement constitutes an infringement of Article 39 EC and Article 7(2) of Regulation No 1612/68.

60 That finding cannot be called in question by the Federal Republic of Germany's argument based on *Geven*, according to which the absence of a sufficiently close connection with German society is capable of justifying the refusal to grant a social advantage. It is apparent from Paragraphs 10a(1) and 79 of the EStG that, in order to obtain the savings-pension bonus, a worker must inter alia be insured under the German statutory social security pension scheme. That compulsory membership of the German social security system, which ensures that workers pay social contributions to that system, constitutes a sufficiently close connection with German society to enable cross-border workers to benefit from the social advantage in question.

61 Moreover, the defendant Member State may not usefully rely, in order to show that there has been no discrimination, on the possibility afforded to cross-border workers to benefit from similar or even more advantageous bonuses in the Member State of residence. The savings-pension bonus in question is not an advantage in the form a tax deduction linked to the taxation of income in Germany, but minimum financial aid given by the German State to encourage workers to set up a complementary pension in order to compensate the reduction in the level of the statutory pension. The fact that cross-border workers may possibly be able to obtain tax reductions in their State of residence does not put an end to the discrimination to which they are subject as regards the grant of the savings-pension bonus.

62 The Federal Republic of Germany claims in the alternative that the unequal treatment is justified by the coherence of the fiscal system.

63 It suffices to point out in that regard that, on the assumption that such discrimination when granting a social advantage may be justified by reasons of fiscal coherence, that justification cannot be accepted in the present case since fiscal coherence is ensured on the basis of bilateral conventions to prevent double taxation concluded by the Federal Republic of Germany with other Member States (see, by analogy, *Wielockx*, paragraph 25).

64 As regards, in the second place, the grant of the supplement of the bonus for children, in accordance with Paragraph 85 of the EstG, it must also be held, for the same reasons, that making the grant of such a supplement conditional on full liability to German tax is contrary to Article 39(2) EC and Article 7(2) of Regulation No 1612/68.

65 As regards, in the third place, the grant of the derived savings-pension bonus to the spouse of the beneficiary, in accordance with Paragraph 79 of the EStG, it should be recalled that, according to the case-law of the Court, the spouse of a worker who falls within the scope of Regulation No 1612/68 is an indirect beneficiary of the equal treatment granted to migrant workers by Article 7(2) of that regulation and may

consequently ask to benefit from the derived savings-pension bonus if the bonus constitutes a social advantage for that migrant worker (see, to that effect, Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 25).

66 That is the case here. A benefit such as the derived savings-pension bonus, which provides financial support for the setting-up of a complementary pension for a worker's spouse, allows the situation of married couples to be improved so far as concerns their future retirement pensions and benefits the worker to the extent that the bonus contributes to creating conditions for covering the risks of old age within his family. Such a bonus therefore constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 for the cross-border workers concerned.

67 It is clear from a reading of Paragraph 79 in conjunction with Paragraph 26(1) of the EStG that a worker's spouse must also be fully liable to German tax in order to obtain the derived bonus. Given that, in the present case, the requirement of full liability to German tax amounts to a residence requirement pursuant to Paragraph 1 of the EStG, such a requirement would operate to the detriment of, in particular, cross-border workers who, by definition, are resident in a Member State where, as a general rule, the members of their family are also resident (*Meeusen*, paragraph 24).

68 It follows that, by making the grant of the savings-pension bonus for spouses subject to the requirement that they be fully liable to German tax, Paragraph 79 of the EStG constitutes indirect discrimination on the basis of nationality contrary to Article 39 EC and Article 7(2) of Regulation No 1612/68.

69 It follows from the foregoing that the first complaint is well founded and that, by introducing and maintaining the provisions for complementary retirement pensions in Paragraphs 79 to 99 of the EStG, the Federal Republic of Germany has failed to fulfil its obligations under Article 39 EC and Article 7(2) of Regulation No 1612/68 in so far as

those provisions deny cross-border workers and their spouses the right to the savings-pension bonus, unless they are fully liable to tax in that Member State.

The second complaint

Arguments of the parties

70 The Commission claims that to make the use, within certain limits, of the subsidised capital for the acquisition or construction of an owner-occupied dwelling subject to the condition that the property be located on the national territory, as Paragraph 92a of the EStG provides, prevents cross-border workers from using the capital that they have saved for the purpose of acquiring or constructing such a dwelling in a region bordering the Federal Republic of Germany. Such unfavourable treatment of cross-border workers constitutes indirect discrimination on the basis of nationality and therefore infringes Article 39(2) EC and Article 7(2) of Regulation No 1612/68. The Commission states that the prohibition of discrimination in the area of freedom of movement for workers is not subject to any reservation in respect of *de minimis* cases.

71 The Commission disputes the Federal Republic of Germany's argument that the disputed provisions do not discriminate against non-national workers given that the measure has the same effects for migrant workers and German workers. The mere fact that cross-border workers form a significant group of persons, who, in most cases, do not relocate to Germany where their employment is located, shows that they have a tendency to acquire dwellings in their State of residence, unlike German workers who tend only exceptionally to acquire dwellings outside their country. On the basis both of

the specific data on the cross-border flow and the case-law, in particular Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 36, the Commission submits that, generally, non-residents are more likely to own a home outside Germany than residents.

72 The Federal Republic of Germany disputes the fact that the use of the subsidised capital for the purpose of acquiring a dwelling in Germany constitutes indirect discrimination on the basis of nationality. Both German workers and workers from other Member States who have their domicile outside the Federal Republic of Germany may not use the savings-pension bonus for the purpose of acquiring or constructing a dwelling outside that Member State.

73 The Federal Republic of Germany submits that freedom of movement for workers is not restricted by Paragraph 92a of the EStG as that provision does not influence the choice of workplace. To find otherwise would mean that all advantages granted solely in the State of employment and not in the State of residence would constitute possible restrictions on the freedom of movement for workers.

74 As a subsidiary argument, the Federal Republic of Germany claims that, in any event, both unequal treatment and a restriction on the freedom of movement for workers are justified by overriding reasons in the public interest, such as recognition of construction aid for dwellings or the guarantee of housing stock and the protection of the national social security system.

Findings of the Court

75 It should be noted, as a preliminary point, that, at the hearing, the Commission stated that this complaint does not relate solely to cross-border workers whose income is taxed exclusively in the State of residence, but relates to all cross-border workers.

76 In the context of this complaint, it is necessary to examine whether, as the Commission submits, Paragraph 92a of the EStG, inasmuch as it makes the use of the subsidised capital for the acquisition or construction of an owner-occupied dwelling subject to the condition that the property be located on German territory, restricts the possibility of making use of a social advantage and constitutes indirect discrimination contrary to Article 39 EC and Article 7(2) of Regulation No 1612/68.

77 Pursuant to Paragraph 92a of the EStG, a beneficiary of the bonus may use up to a maximum of EUR 50 000 of the subsidised capital built up under the savings-pension contract for the acquisition or construction of an owner-occupied dwelling on the national territory.

78 Clearly therefore, the subsidised capital in question may not be used for the acquisition or construction of a dwelling in a border region outside Germany.

79 Whilst it is certainly true, as the Federal Republic of Germany submits, that neither German workers nor cross-border workers may use that capital to acquire or construct, outside Germany, a dwelling and that Paragraph 92a of the EStG is not specifically directed at non-residents, the fact remains that non-residents are more likely to be interested in purchasing a dwelling outside Germany than residents (see, to that effect, *Ritter-Coulais*, paragraph 36).

80 It follows that Paragraph 92a of the EStG affords cross-border workers less favourable treatment than that enjoyed by workers resident in Germany and therefore constitutes indirect discrimination on grounds of nationality.

81 It is now necessary to examine whether the unfavourable treatment of cross-border workers is justified by the aim of ensuring an adequate supply of housing and of preserving the national social security regime, as the Federal Republic of Germany claims.

82 As regards, in the first place, the aim of ensuring an adequate supply of housing, it should be pointed out that, on the assumption that such an aim constitutes an overriding reason in the public interest, the requirement, laid down in Paragraph 92a of the EStG, that the dwelling to be acquired or constructed must be situated in Germany on any view goes beyond what is necessary to achieve the desired objective since that objective could be just as easily attained if cross-border workers continue to establish their residence in another Member State rather than in Germany (see, to that effect, Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraphs 27 and 28).

83 Moreover, the defendant State's argument alleging a risk of conflict with the housing policies of other Member States cannot be accepted since that risk has not been established in the present case; the Federal Republic of Germany has merely stated in general terms that if the possibility of using the capital of the savings-pension for the acquisition or construction of a dwelling were extended to the territory of other Member States, this might disrupt their housing policy.

84 As regards, in the second place, protection of the national social security system, it is apparent from Case C-208/05 *ITC* [2007] ECR I-181, paragraph 43, that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the public interest. However, such a risk has not been established in the present case. The Federal Republic of Germany has merely stated that, if beneficiaries own a dwelling, there is no risk that during their retirement they will have to bear the costs of rent and will not have to resort to social security benefits. In addition, that objective can be attained in the same way if the capital of the savings-pension is able to be used for the acquisition of a dwelling outside Germany.

85 It follows from the foregoing that this complaint is well founded and that the Federal Republic of Germany has failed to fulfil its obligations under Article 39 EC and Article 7(2) of Regulation No 1612/68 by denying cross-border workers the right to use the subsidised capital for the acquisition or construction of an owner-occupied dwelling unless it is situated in Germany.

The third complaint

Arguments of the parties

86 The Commission considers that the obligation to reimburse the savings-pension bonus on termination of liability to unlimited taxation pursuant to the combined application of Paragraphs 93 to 95 of the EStG infringes Article 39 EC and Article 7(2) of Regulation No 1612/68 as well as Articles 12 EC and 18 EC.

87 As regards, first, freedom of movement for workers, the legislation in question constitutes indirect discrimination to the extent that it extends to all cross-border workers and other migrant workers whereas it is those two categories of workers which, unlike German workers, most often and in particular when they leave their employment in order to work in another Member State, are more likely to cease to be fully liable to tax in Germany. In addition, the legislation in question is liable from the outset to reduce the value of the bonus for migrant workers, and they may refrain from requesting that savings-pension bonus in the first place in order to avoid any subsequent repayment.

88 The Commission also claims that the provisions in question constitute an obstacle to freedom of movement for workers. Referring by way of comparison to Case C-9/02 *Lasteyrie du Saillant* [2004] ECR I-2409, it submits that workers who exercise their activity in Germany but reside outside that Member State are in a less favourable situation than those who continue to reside in the national territory since, when

workers from that first category choose to reside outside the Federal Republic of Germany, that Member State appropriates certain of their assets.

89 The difference between the two situations which consists, for persons who leave Germany, in reimbursing the savings-pension bonus on termination of full liability to taxation in that State and, for those who remain in Germany, in being taxed at a later stage on payments from the savings-pension fund does not alter the Commission's assessment, since that difference appears only after several decades and has no impact on the deterrent effect of the obligation to reimburse.

90 The Commission adds that, even if the rules on reimbursement may alleviate the severity of the legislation in question, they do not undermine the principle itself of repayment of the bonus.

91 In addition, in the Commission's view, the Federal Republic of Germany's lack of competence to tax future payments from the savings-pension fund to persons who leave Germany cannot be invoked as a justification based on fiscal coherence, which is already ensured by bilateral conventions to prevent double taxation.

92 Second, as regards Article 12 EC, the Commission submits that the obligation to reimburse constitutes disguised discrimination contrary to that article since it affects principally non-nationals. That assessment is based on the finding that, on termination of their activity in Germany, it is principally non-national workers who will leave that Member State, generally to return to their State of origin, whereas national workers do not frequently decide to retire abroad. Article 18 EC is also infringed. The obligation to

reimburse dissuades citizens of the European Union regardless of their nationality, including German nationals, from transferring their residence to another Member State.

93 The Federal Republic of Germany disputes that Paragraph 95 of the EStG infringes the principle of freedom of movement for workers and Articles 12 EC and 18 EC.

94 It first submits that the obligation to reimburse on termination of full liability to tax is not a real obstacle to the free movement of workers or citizens as it is not capable of discouraging those concerned from transferring their place of employment or domicile abroad. A beneficiary of the bonus must only reimburse the bonus referred to in Paragraph 79 et seq. of the EStG and the tax reductions stemming from the deduction of special expenses pursuant to Paragraph 10(a) of the EStG. No other 'exit taxation' is provided for, unlike that which was the subject of the judgments in *Lasteyrie du Saillant* and Case C-470/04 *N* [2006] ECR I-7409.

95 The Federal Republic of Germany adds that, in accordance with Paragraph 95(2) of the EStG, reimbursement may, at the taxpayer's request, be postponed until payments start under the savings-pension contract and that it can be made by maximum instalments of 15% of the pensions paid out under that contract, thus enabling the taxpayer to transfer his place of work and his domicile at no direct financial cost. In addition, the person concerned is released from the obligation to reimburse once he again becomes fully liable to German tax. The defendant State infers from the judgment in *N* that a suspension of payment without provision of a guarantee may eliminate the restrictive nature of a payment obligation linked to departure from Germany.

96 Next, the Federal Republic of Germany claims, relying on several examples, that loss of the status of fully-liable taxpayer does not entail either for cross-border workers or for citizens financial disadvantages capable of amounting to disguised discrimination.

Whilst it is true that beneficiaries whose full liability to German tax comes to an end must reimburse the tax incentive received, they are not however taxed a posteriori on payments under the savings-pension contract to which they are entitled on the basis of the payments made until termination of their liability. The obligation to reimburse is compensated by financial advantages which are at least equivalent.

97 Lastly, in the alternative, Paragraph 95 of the EStG is also justified for reasons of fiscal coherence.

Findings of the Court

98 In the first place, as regards the part of the complaint relating to the discriminatory nature of the obligation to reimburse on termination of full liability to taxation, it should be borne in mind that, according to the case-law, the general prohibition of all discrimination on grounds of nationality laid down by Article 12 EC applies independently only to situations governed by Community law for which the EC Treaty lays down no specific rules of non-discrimination (see, inter alia, Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 12 and 13, and Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 28).

99 In relation to the right of freedom of movement for workers, the principle of non-discrimination was implemented by Article 39 EC and Article 7 of Regulation No 1612/68 (see, to that effect, Case C-94/07 *Raccanelli* [2008] ECR I-5939, paragraph 45).

100 Accordingly, it is in the light of those two provisions that it is necessary to compare the treatment applied to workers who remain in Germany with that applied to workers who leave Germany.

101 Pursuant to Paragraphs 93 to 95 of the EStG, a beneficiary of the bonus who leaves his domicile or habitual residence in Germany, and who is therefore no longer fully liable to tax, must reimburse the savings-pension bonuses obtained and, as the case may be, the deductions of special expenses under Paragraph 10a of the EStG.

102 It should be noted that, in the present case, migrant workers, who are generally non-nationals, are more likely to leave Germany to work and establish their residence in another Member State and thus more likely to cease being fully liable to German tax. Foreign workers are therefore more likely to be the subject of a disadvantage than German workers.

103 In addition, the provisions at issue may reduce the value of the bonus for migrant workers alone. It cannot be ruled out that migrant workers wishing to avoid any subsequent reimbursement of the savings-pension bonus on termination of their full liability to German tax will, from the outset, forego the grant of that bonus. In that case, any compensation for the future reduction in the level of the German statutory pension is therefore precluded.

104 It follows that the provisions at issue discriminate indirectly against migrant workers.

105 That finding cannot be called in question by the fact, relied upon by the Federal Republic of Germany, that subsequent payments under the savings-pension are not

taxed in Germany when workers leave Germany. That fact is irrelevant since the competence to tax those payments has been granted to other Member States pursuant to bilateral conventions to prevent double taxation concluded between those Member States and the Federal Republic of Germany, as the latter moreover acknowledges. Moreover, the fact that, for workers who remain in Germany, taxation of the payments arises, as the case may be, only after several decades is not comparable to the obligation to reimburse on termination of full liability to German tax which applies to those who leave Germany.

106 In the second place, as regards the part of the complaint relating to the deterrent nature of the obligation to reimburse on termination of full liability to German tax, it should first be borne in mind that, according to settled case-law, Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to freedom of movement for workers (*Hendrix*, paragraph 61 and the case-law cited).

107 Next, provisions preventing or deterring a national of a Member State from leaving his country of origin, and thus from exercising his right to freedom of movement, therefore constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned (see *ITC*, paragraph 33, and Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 16).

108 It would be incompatible with the right to freedom of movement were a worker or a person seeking employment, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement (*ITC*, paragraph 34).

109 Since the provisions at issue require beneficiaries to reimburse, on termination of full liability to German tax, the savings-pension bonus received from that State, any German worker wishing to avail himself of his right to freedom of movement pursuant to Article 39 EC, and, in particular, his right to establish himself in another Member State, therefore finds himself in a less favourable position than a worker who maintains his residence in Germany and continues to be fully liable to German tax. That difference of treatment is likely to discourage workers of German nationality from exercising a professional activity outside Germany.

110 Examination of the rules on reimbursement laid down by the provisions at issue bears out that conclusion, contrary to the claims of the defendant. First, although those rules may indeed reduce the severity of the legislation, they none the less continue to affect workers who cease to be fully liable to German tax merely because they have transferred their residence to another Member State. Second, although it is possible to obtain an interest-free suspension of payment until the beginning of the stage at which payments under the savings-contract are made, that extension is not automatic, but at the request of the beneficiary. Moreover, although the moratorium may be extended after the beginning of the payment stage, that extension is subject to the condition that a minimum amount of 15% of the payments under the savings-pension contract be reimbursed. Those rules on reimbursement have a restrictive effect in that they deprive the beneficiary of the savings-pension bonus of the enjoyment of a social advantage (see, to that effect, the *N* case, paragraph 36).

111 Similarly, the fact relied upon by the Federal Republic of Germany that, pursuant to Paragraph 95(3) of the EStG, an amount to be reimbursed which is subject to a suspension of payment is released once the person concerned regains his status of a fully-liable taxpayer bears out the deterrent effect of the disputed provisions. Paragraph 95(3) does not eliminate the deterrent effect on workers residing on a long-term basis in another Member State since even if the amount to be reimbursed is released when they regain their status of fully-liable taxpayer, they have irrevocably lost the amounts of the bonus already reimbursed.

112 In those circumstances, the reimbursement obligation stemming from the combined application of Articles 93 to 95 of the EStG is liable to impede freedom of movement for workers.

113 The Federal Republic of Germany further submits that the obligation to reimburse is justified in the light of the coherence of its tax system. However, since fiscal coherence is ensured on the basis of bilateral conventions to prevent double taxation concluded by that State with other Member States, the Federal Republic of Germany may not usefully rely on that justification (see, to that effect, *Wielockx*, paragraph 25).

114 It follows that the disputed provisions are contrary to Article 39 EC and Article 7(2) of Regulation No 1612/68.

115 The same conclusion applies in respect of persons who are not economically active, for the same reasons, in respect of the complaint relating to infringement of Article 18 EC.

116 It follows from the foregoing that the third complaint is well founded and that, consequently, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC and 39 EC and Article 7(2) of Regulation No 1612/68 by requiring, in accordance with Paragraphs 93 to 95 of the EStG, that the bonus be reimbursed on termination of full liability to German tax.

Costs

117 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by introducing and maintaining the provisions for complementary pensions in Paragraphs 79 to 99 of the Federal Law on Income Tax (Einkommensteuergesetz), the Federal Republic of Germany has failed to fulfil its obligations under Article 39 EC and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Article 18 EC, in so far as those provisions:**

   — **deny cross-border workers and their spouses the right to the savings-pension bonus, unless they are fully liable to tax in that Member State;**

   — **prohibit cross-border workers from using the subsidised capital for the acquisition or construction of an owner-occupied dwelling unless the property is situated in Germany, and**

— **provide that the bonus be reimbursed on termination of full liability to tax in that Member State;**

2. Orders the Federal Republic of Germany to pay the costs.

[Signatures]