Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 24 November 2011 [1]

Case C-39/10

European Commission
v

Republic of Estonia

(Failure of a Member State to fulfil obligations — Plea of inadmissibility — Interveners — Freedom of movement for workers — Article 45 TFEU — Article 28 of the EEA Agreement — Tax legislation — Income tax — Retirement pensions — Allowance for low incomes — Discrimination between resident and non-resident taxpayers)

I – Introduction

1. The Republic of Estonia applies a Law on income tax which does not provide for an individual allowance to be granted to non-resident taxpayers whose total income is so low that such relief would apply to them if they were resident in the national territory.

2. By its application, the European Commission asks the Court to declare that, by applying such a law, the Republic of Estonia has failed to fulfil its obligations under Article 45 of the Treaty on the Functioning of the European Union [2] and Article 28 of the Agreement on the European Economic Area of 2 May 1992 ('the EEA Agreement'). [3]

3. The Republic of Estonia has disputed the complaints made against it whilst recognising the need to supplement the provisions of its legislation which concern the right to deductions relating to the income of residents of a Member State of the European Union so that the scope of those provisions is extended to nationals of all the States parties to the EEA Agreement.

4. In my view, the present action for failure to fulfil obligations opens up interesting prospects with regard to the effect of freedom of movement for workers on the power that Member States have to decide for themselves the tax system they apply to pensioners who have exercised that fundamental freedom.

5. However, defective drafting and inconsistent reasoning which have been observed in the wording of the application and in the Commission's subsequent pleadings seem to me likely to render this action inadmissible.

1 — Original language: French.

2 — In the present case, the date of the reasoned opinion which the Commission sent to the Republic of Estonia, which establishes the time at which the existence of any failure to fulfil obligations must be assessed, is 17 October 2008. That date therefore precedes the entry into force of the Treaty of Lisbon on 1 December 2009. However, the parties agree that the circumstances which may have given rise to the alleged failure to fulfil obligations continued after the reasoned opinion and persisted on 22 January 2010, the date on which the application was lodged. In addition, in the application in this case the Commission no longer referred to the provisions of the EC Treaty, but to those of the TFEU. Reference will therefore be made to the latter provisions.

3 — OJ 1994 L 1, p. 3.

II – Legal context

A – *European Union law*

1. Article 45 TFEU and Article 28 of the EEA Agreement

6. Article 45 TFEU provides that:

‘1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.’

7. Article 28 of the EEA Agreement guarantees freedom of movement for workers among the Member States of the European Community and the States of the European Free Trade Association (EFTA), in terms identical in meaning to the provisions of Article 45 TFEU.

2. Recommendation 94/79/EC

8. Recommendation 94/79/EC,[4] which is relied on by the Republic of Estonia and by some of the interveners, concerns the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident.

9. Article 1(1) of Recommendation 94/79 provides that:

‘1. Member States apply the provisions of this recommendation to natural persons who are residents of one Member State and who are subject to income tax in another Member State, without being resident there, on the following items of income:

…

4 — Commission recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJ 1994 L 39, p. 22).

— pensions and other similar remuneration received in consideration of past employment, including social security pensions,

— …'

10. Article 2(1) and the first subparagraph of Article 2(2) of that recommendation provide:

'1. Member States do not subject the items of income specified in Article 1(1), in the Member State of taxation, to any heavier taxation than if the taxpayer, his spouse and his children were resident in that Member State.

2. Application of the provisions of paragraph 1 shall be subject to the condition that the items of income specified in Article 1(1) which are taxable in the Member State in which the natural person is not resident constitute at least 75% of that person's total taxable income during the tax year.'

B – *National legislation*

11. The 1999 Estonian Law on income tax, in the version applicable on the date of the Commission's reasoned opinion, namely in 2008, is worded as follows:[5]

'Paragraph 1.

Subject of the tax

(1) Income tax shall be charged on the taxpayer's income, less the allowances permitted by the Law.

…'

'Paragraph 2.

Taxpayer

(1) The income tax referred to in Paragraph 1(1) is to be paid by natural persons and non-resident legal persons who receive taxable income.

…'

'Paragraph 19.

Maintenance, pensions, educational grants, allowances, bonuses, lottery prizes, benefits

…

(2) Income tax shall be charged on pensions, allowances, educational grants, cultural, sports and science awards, lottery prizes, benefits received under the Law on parental benefits, and travel and "per diem" payments for sports events. …'

'Paragraph 23.

Tax-free income

A tax-free amount is deducted from the income of a resident natural person during a tax period:

(1) EEK 27 000 in 2008;

…'

5 — Tulumaksuseadus (RT I 1999, 101, 903; RT I 2008, 34, 208).

‘Paragraph 23[2].

Supplementary tax-free income in the case of a pension

From the income of a resident natural person receiving a pension payable under the Law by a contracting State, a compulsory capitalisation pension provided for by the legislation of that State, or a pension deriving from a social security agreement, there is additionally deducted a tax-free amount equivalent to the sum of those pensions, but not more than EEK 36 000 in a tax period.’

‘Paragraph 28[3].

Deductions from the income of a resident of a Member State of the European Union

A natural person resident in another Member State of the European Union who has received at least 75% of his taxable income in Estonia during a tax period and submits a resident natural person’s declaration of income may also make the deductions laid down in this Chapter from his income taxable in Estonia. Taxable income is understood to mean income before deductions are made in accordance with the legislation of that State.’

‘Paragraph 29.

Taxable income of a non-resident

…

(9) Income tax shall be charged on pensions and educational grants, cultural, sports and science awards, benefits, unemployment benefits, lottery prizes, and benefits received under the Law on parental benefits, paid to a non-resident by the Estonian State, a local authority or a resident on the conditions laid down in Paragraph 19(2) and (3), and also on maintenance and maintenance payments referred to in Paragraph 19(1). Income tax shall be charged on insurance payments made on the conditions laid down in Paragraphs 20 and 21 to a non-resident by the Estonian Sickness Fund, the Estonian Unemployment Fund or a resident insurance company, and on payments made by a pension fund registered in Estonia.…’

‘Paragraph 41.

Payments from which income tax is deducted at source

…

(6) Insurance payments, pensions, payments from a pension fund, educational grants, lottery prizes, maintenance, maintenance payments, benefits paid under the Law on family benefits (Paragraph 19(1) and (2), Paragraph 20(1) to (3), Paragraph 201, Paragraph 21(1), Paragraph 29(9)) or other payments which are subject to income tax, payable to a non-resident or to a resident natural person, with the exception of the payments set out in point 12;…’

‘Paragraph 42.

Deductions made when income tax is deducted at source

…

(11) From a pension payable under the Law by the Estonian State to a resident natural person, and from a compulsory capitalisation pension provided for by the Law on capitalisation pensions, there is deducted, before calculation of the tax to be deducted at source, an additional tax-free amount equivalent to the pension, but in each calendar month not more in total than 1/12 of the sum laid down in Paragraph 23[2].…’

III – Pre-litigation procedure

12. The Commission received a complaint from a person of Estonian nationality resident in Finland concerning the income tax levied on the pension paid to him by the Republic of Estonia. The person concerned complained that the tax allowance threshold provided for in respect of residents had not been applied to him, nor had the supplementary tax allowance threshold provided for in respect of residents who receive a pension.

13. Having reached retirement age in Estonia, that person went to live in Finland, where he worked, which meant that he was entitled to a retirement pension there too. He thus receives two pensions, one from Estonia and the other from Finland, which amount to more or less the same figure. The pension from Estonia is subject to income tax, in contrast to the pension from Finland. [6]

14. Since the person concerned has a very low total income, which does not exceed the personal allowance threshold provided for in respect of persons resident in Finland, he does not pay tax in that Member State. Therefore, when determining the amount of income tax due in Finland, that person is not entitled to a tax credit which would take into account the tax paid in Estonia in respect of the pension received in the latter State.

15. In the light of those facts, the Commission considered that, in that country, the tax burden borne by non-residents in a similar situation to that of the person who lodged the complaint was higher than it would have been if they received all their income by way of a pension from a single Member State, whether it be the Republic of Finland or the Republic of Estonia. It took the view that the overall income received by such a taxpayer by way of his pensions in Estonia and Finland would only just exceed the exemption threshold for pensioners resident in Estonia, if Paragraphs 23 and 23^2 of the Estonian Law on income tax were applicable to him.

16. Therefore, on 4 February 2008, the Commission sent a letter of formal notice to the Republic of Estonia inviting it to submit its observations with regard to whether the provisions of the national legislation *on the taxation of pensions* paid to non-residents are incompatible with Article 39 EC and Article 28 of the EEA Agreement.

17. In a letter of 9 April 2008, the Republic of Estonia objected to the Commission's point of view and contended that its legislation made it possible for non-residents who receive the majority of their income, in other words at least 75% of it, from Estonia to be subject to the same tax arrangements as residents. In its view, in other cases it would fall to the State in which the person concerned resides to ensure that that individual is correctly taxed.

18. On 17 October 2008, the Commission sent a reasoned opinion to the Republic of Estonia requesting it to adopt the measures necessary to comply with the opinion within two months from the date of its receipt.

19. By reply of 18 December 2008, the Republic of Estonia expressed its disagreement with the complaints put forward by the Commission as regards the incompatibility of the Estonian Law on income tax with Article 39 EC. However, it recognised that the law did have some shortcomings in relation to Article 28 of the EEA Agreement and stated that it was prepared to extend the scope of Article 28^3 of that law to include nationals of the Member States of the European Economic Area.

20. Taking the view that the situation remained unsatisfactory, the Commission brought the present action.

6 — On 23 March 1993 in Helsinki, the Republic of Estonia and the Republic of Finland signed a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (RT II 1993, 37, 113), Article 18 of which is applicable.

IV – Proceedings before the Court

21. By its application lodged on 22 January 2010, the Commission asked the Court 'to declare that the Republic of Estonia has not complied with the obligations under Article 45 [TFEU] and Article 28 of the EEA Agreement, since its legislation does not provide for a personal allowance to be granted to non-residents whose total income is so modest that they would benefit from the allowance if they were resident taxpayers'.

22. The Republic of Estonia contended that the Court should declare the action inadmissible, or else that it should dismiss the action on the basis of a different interpretation of the provisions referred to, and that it should order the Commission to pay the costs.

23. The Kingdom of Spain, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland submitted statements in intervention in support of the form of order sought by the Republic of Estonia.

24. The Federal Republic of Germany and the Kingdom of Sweden were granted leave to intervene and to submit their observations during the oral procedure in support of the form of order sought by the defendant Member State.

25. During the hearing held on 15 September 2011, the Commission and the Republic of Estonia, as well as the Kingdom of Spain and the Kingdom of Sweden, presented oral observations.

V – Analysis of the action for failure to fulfil obligations

A – *Admissibility of the action*

26. The Republic of Estonia's principal plea is that the Court should reject the Commission's application as inadmissible.

27. Two interveners, namely the Kingdom of Spain and the Portuguese Republic, have also pleaded that the action for failure to fulfil obligations brought against the Republic of Estonia is inadmissible.

1. Plea of inadmissibility based on the ambiguous wording of the action

28. In its rejoinder, the Republic of Estonia, supported by the Kingdom of Spain in this regard, raised a plea of inadmissibility based on the lack of clarity of the Commission's written submissions. The defendant argued that the applicant had not explicitly specified the cases in which a State should apply a tax allowance to residents of another Member State and, thus, how the alleged failure to fulfil obligations could have been remedied. The Republic of Estonia asserted that the Commission had stated in its application that the relevant application criterion was the fact that the worldwide income of non-residents is less than the allowance threshold provided for by the source State, whereas in its reply the Commission suggested that the allowance threshold in force in the State of residence should be used. The Estonian Government argued that the contradiction thus observed in the complaints put forward by the Commission vitiated its action for failure to fulfil obligations since there was an ambiguity concerning a point considered to be essential to understanding the purpose of the request, that being a deficiency which should lead the Court to declare the action inadmissible.

29. However, the Commission contended that its claims were not unclear or contradictory and clarified that it was of the view that a Member State is obliged to take into account only the minimum level of income that a taxpayer must receive in order to be considered capable of contributing towards public expenditure in accordance with the provisions of its own legal system, and not the level set in the other Member States concerned.

30. At the hearing, the Commission also contended that the fact that a ground of inadmissibility was raised by the defendant only at the stage of its rejoinder, and not earlier, was contrary to the provisions of the Statute of the Court of Justice of the European Union. However, the Republic of Estonia pointed out that it had already made reference in its statement in defence to a lack of clarity in the application with regard to whether the allowance threshold of the State of residence is taken into account.

31. I would point out that Article 38(1)(c) of the Rules of Procedure of the Court, read in conjunction with Article 21 of the Statute of the Court, stipulates, under the conditions for admissibility, that an application bringing an action for failure to fulfil obligations before the Court must state the subject-matter of the proceedings and a summary of the pleas in law relied on by the applicant.

32. The Court has held that the Commission must, in the heads of claim in any application made under Article 258 TFEU, indicate the specific complaints on which the Court is asked to rule. Those heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint.[7] Contradictions,[8] or a laconic statement,[9] contained in the statement of the pleas in law put forward by the Commission in support of an action for failure to fulfil obligations do not satisfy the requirements of the two abovementioned articles. If those requirements are not met, the penalty incurred is the inadmissibility of the complaints based on insufficient and unclear elements, since they do not make it possible to identify all the essential elements of the failure to fulfil obligations.[10]

33. Thus, an action for failure to fulfil obligations which is founded on ambiguous or contradictory arguments must be declared inadmissible since it prevents both the Member State on which an application initiating proceedings has been served and the Court from appreciating exactly the scope of the infringement of European Union law complained of. Such an understanding is necessary in order to enable both the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged.[11]

34. On reading the application and the other pleadings of the Commission, it seems to me that in the present case the Commission has not set out clearly and precisely its complaint concerning the allowance threshold to be taken into account by a Member State in which income is received and which intends to make taxpayers who are not resident in its territory liable to a direct tax. The Republic of Estonia has shown, through various detailed examples in its rejoinder, the intrinsic lack of precision in the application, as well as the existence of discrepancies between the Commission's application and its statement in reply in respect of that complaint. The plea raised by Estonia is therefore well founded in my view.

35. I would add that even the subject-matter of its action has not been clearly delimited by the Commission. In fact, it is only in the course of discussions held during the hearing that the applicant defined the scope of its action, despite that being an essential point. In response to the questions put to it, the Commission stated that, although a global approach appeared to have been taken in the application, the action for failure to fulfil obligations should be understood not as concerning the

7 — See, in particular, the judgment of 12 November 2009 in Case C-154/08 *Commission* v *Spain*, paragraphs 60 and 63 and case-law cited, and Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275, paragraph 26 and case-law cited.

8 — See, in particular, Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24; Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 47; and the judgment of 11 September 2008 in Case C-305/06 *Commission* v *Greece*, paragraph 46.

9 — Case C-165/08 *Commission* v *Poland* [2009] ECR I-6843, paragraphs 42 to 47.

10 — See, in particular, the judgment of 20 October 2004 in Case C-431/02 *Commission* v *United Kingdom*, paragraphs 25 to 29 and case-law cited.

11 — See, in particular, Case C-199/04 *Commission* v *United Kingdom* [2007] ECR I-1221, paragraphs 21, 25 and 26 and case-law cited, and the judgment of 12 February 2009 in Case C-475/07 *Commission* v *Poland*, paragraph 44 and case-law cited.

situation of all taxpayers who receive a very low income in Estonia [12] and who reside in another Member State, but as being limited to the situation of non-residents who are entitled to retirement pensions in Estonia. However, confusion is entirely possible in view of the extensive wording of the application in this case. [13] Moreover, the observations submitted by the Republic of Estonia, and by the Member States which intervened in support of the defendant, were all based on a view of the action according to which it was not limited to non-resident pensioners, but was extended to all non-resident taxpayers in general.

36. Since the Court may examine of its own motion whether the conditions imposed by Article 258 TFEU for bringing such an action are satisfied, [14] it seems to me that the Court must make use of that power to penalise the Commission's shortcomings in the present case. It should not be overlooked that because of the importance which the FEU Treaty attaches to the action available to the European Union against Member States for failure to fulfil obligations, this procedure is surrounded by guarantees which must not be ignored, particularly in view of the obligation imposed on Member States to take the necessary measures to comply with the judgment of the Court. [15]

37. In the context of a procedure such as this, it is essential that the Member State against which an allegation of failure to fulfil obligations is made should know exactly what it should have done. In this instance, the information given by the Commission to the Republic of Estonia was not clear enough to allow the latter to prepare its defence without difficulty. Moreover, against that background the Court is not fully able to judge whether or not the pleas in law submitted by the applicant are well founded.

38. Since this action for failure to fulfil obligations is based on a statement of grounds which is both inconsistent and imprecise, in my view it does not comply with the abovementioned conditions and should therefore be declared inadmissible in its entirety on that ground.

2. Plea of inadmissibility based on Recommendation 94/79

39. According to the Portuguese Republic, the Commission's approach has been contradictory, which undermines the principles of good administration, sincere cooperation and the protection of legitimate expectations, in that it has brought an action for failure to fulfil obligations against the Republic of Estonia while disregarding the fact that the wording of the law at issue complied with Recommendation 94/79, in which the applicant had established its own policy in that field, no subsequent act having revoked or replaced that recommendation.

40. Similarly, the Kingdom of Spain submits that the Commission has infringed the principle of the protection of legitimate expectations since it has created an expectation on the part of the Member States that if they comply with the criteria set out in Recommendation 94/79 they cannot be charged with failure to fulfil obligations. The Kingdom of Spain adds that, by changing its opinion without providing an explanation and without having adopted a new recommendation, the Commission has also infringed the principle of legal certainty, which protects Member States, since any declaration by the Court of failure to fulfil obligations is likely to render liable the State against which the action has been brought.

41. The two interveners claim that the penalty for such conduct on the part of the Commission should be that its action is declared inadmissible or dismissed.

12 — I would point out that the term 'income', within the meaning of Paragraph 19(2) of the national Law on income tax, is understood in a broad sense by the Republic of Estonia.

13 — To this effect, see the form of order sought in the application, which essentially reproduces the final part of the reasoned opinion, it being noted also that Paragraph 23^2 of the law in question, which relates to the supplementary allowance in the case of a pension, is not the only one referred to in the grounds of the action for failure to fulfil obligations.

14 — See, in particular, Case C-199/04 *Commission* v *United Kingdom*, paragraph 20 and case-law cited.

15 — Case 7/69 *Commission* v *Italy* [1970] ECR 111.

42. In response, the Commission contends that the Kingdom of Spain and the Portuguese Republic have raised pleas of inadmissibility which had not been relied on as such by the defendant Member State. On the basis of the fourth paragraph of Article 40 of the Protocol on the Statute of the Court and Article 93(4) of the Rules of Procedure, as well as case-law,[16] it maintains that the interveners may not raise a new plea of inadmissibility and that the Court is therefore not required to examine those pleas.

43. It should be noted that the second paragraph of Article 40 of the Protocol on the Statute of the Court states that the right to intervene in a case before the Court is open to any person who can establish an interest in the result of the case. Under the fourth paragraph of that article, '[a]n application to intervene shall be limited to supporting the form of order sought by one of the parties'. Moreover, Article 93(4) of the Rules of Procedure requires '[t]he intervener [to] accept the case as he finds it at the time of his intervention'.

44. It has been held that, although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that, first, they do not alter the framework of the dispute and, secondly, the intervention is still intended to support the form of order sought by that party.[17] In addition, it is established that an intervener does not have the standing necessary to raise a plea of inadmissibility not set out in the form of order sought by the defendant.[18]

45. In the present case, it is true that the Kingdom of Spain and the Portuguese Republic have raised a plea of inadmissibility in support of the form of order sought by the defendant, which itself asserted that the application was inadmissible.

46. However, the Republic of Estonia has relied on the inadmissibility of the action for failure to fulfil obligations on the basis of a different ground from the one put forward by the two interveners. It therefore seems to me that, although they do not have the standing necessary to do so, the Kingdom of Spain and the Portuguese Republic have raised a plea of inadmissibility which has a different basis to the plea raised by the party they are supporting and the examination of which would have the effect of altering the subject-matter of the dispute as it is defined in the application and in the submissions of both the Commission and the defendant.

47. It seems to me conceivable that a Member State charged with failure to fulfil obligations would not wish to raise a plea of inadmissibility based on grounds that it deliberately decided not to raise. Member States which are given leave to intervene in the proceedings in which it is involved cannot, by putting forward supplementary arguments in the framework of the dispute, have the power to force the defendant State to define its position on points it had no intention of debating.

48. It is only if there is a plea of inadmissibility based on public policy that the Court examines the admissibility of the application of its own motion, under Article 92(2) of the Rules of Procedure.[19] Thus, the Court examines the substance of an inadmissibility plea raised by an intervener, and not by the defendant, solely when it raises an issue of public policy.[20]

16 — The Commission refers to Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 in this respect.

17 — See, in particular, Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 32; Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 56; and Case C-61/08 *Commission* v *Greece* [2011] ECR I-4399, paragraph 33 et seq. That line of case-law has also been followed by the General Court, in particular in Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 52.

18 — See Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 67 and case-law cited.

19 — See, to this effect, *Matra* v *Commission*, paragraph 13 and case-law cited.

20 — Point 65 of the Opinion of Advocate General Sharpston in *Chronopost and La Poste* v *UFEX and Others*.

49. That does not seem to me to be the case of the plea of inadmissibility which the Portuguese and Spanish Governments have put forward here, even if the latter has asserted that the infringement of general principles of European Union law is a matter of public policy which the Court could [21] and even should [22] examine of its own motion. In my view, public policy would be in issue only if non-compliance with such principles adversely affected a procedural rule, rather than a substantive rule, which is regarded as a fundamental safeguard to be protected by the Court.

50. In the light of the foregoing, I take the view that the plea of inadmissibility raised by the interveners must be rejected, in contrast to the plea raised by the defendant, which should lead the Court to declare this action for failure to fulfil obligations inadmissible on account of its lack of clarity.

51. I shall, however, set out some proposals in the alternative, in order to cover the situation where the Court takes the view, for its part, that it is necessary to rule on whether there is a failure to fulfil obligations.

B – *Substance*

52. In the event that the Court takes the view that the application made in this case is admissible, the failure to fulfil obligations with which the Republic of Estonia may be charged should, in my opinion, concern only the taxation of income received by pensioners who have exercised their freedom of movement within the European Union as workers and who receive pensions from two Member States. Such a restriction on the scope of the action is a consequence of the fact that, at the hearing, the Commission stated that, in spite of the extensive wording of its own written submissions, their subject-matter had to be understood as being focused on that issue. It follows that the application should, in my view, be rejected as unfounded in respect of the remainder, namely in so far as it concerns taxpayers other than those falling within that category of persons.

1. The infringement of Article 45 TFEU

a) The defence based on Recommendation 94/79

53. According to the Republic of Estonia, by bringing an action for failure to fulfil obligations against it, the Commission has not complied with the wording of its Recommendation 94/79. The defendant points out that the Commission stated in that act that equal treatment of residents and non-residents applies only where the non-resident receives, in the tax year in question, at least 75% of his taxable income in the source State, as has been provided for in Estonian territory in the present case.

54. In the light of the national provisions at issue, read in conjunction with Article 2 of Recommendation 94/79 in particular, [23] it seems clear to me that the Republic of Estonia has genuinely drawn from the rules contained in that act. However, is it enough that the legislature of a Member State has reproduced the criterion set out in a recommendation for that State to be exempt from all possibility of being proceeded against for failure to fulfil obligations? I think not.

21 — In its statement in intervention, the Kingdom of Spain referred in this regard to Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 40, which merely states that the Court 'is entitled to ascertain of its own motion *whether the procedural safeguards* conferred by the European Union's legal order *have been complied with*' (emphasis added).

22 — At the hearing, the Kingdom of Spain relied, in this regard, on 'Case C-170/99 *Italy* v *Commission*', which I believe is actually Case C-107/99 *Italy* v *Commission* [2002] ECR I-1091, paragraphs 29 and 30, in which the Court examined of its own motion whether the action was time-barred.

23 — See also the sixth and seventh recitals in the preamble to that recommendation, as well as paragraphs 14 and 15 of the Republic of Estonia's statement of grounds.

55. The Commission asserts in reply that an act such as Recommendation 94/79 does not produce binding effects and that its purpose cannot be to supplement the rules of primary legislation on freedom of movement for persons.

56. I would point out that, in accordance with the fifth paragraph of Article 249 EC, acts which are not decisions, such as Recommendation 94/79, are to 'have no binding force' upon those to whom they are addressed.

57. However, as the Republic of Estonia makes clear, the Court has consistently held that, even if recommendations are not capable of creating rights that individuals can rely on before the courts of the Member States, they are not without any legal effect with regard to the interpretation of a national law which, like the law at issue in this case, has been adopted in connection with European Union law, since those courts are bound to take them into consideration in order to decide disputes brought before them in this regard. [24]

58. Furthermore, a recommendation may have indirect legal effects if the view is taken that the institution which is the author of the act is itself bound in such a way that it has given rise to a legitimate expectation which may be relied on in an action before the Court. In the present case, the Commission states that, in adopting the provisions contained in Recommendation 94/79, it did not mean to prevent itself from subsequently bringing actions for failure to fulfil obligations in the field covered by that act. It is clear from the third and fourth recitals in the preamble to that recommendation that the opinion given by the Commission in that act does not prevent it from pursuing an active policy with relation to infringement proceedings for the purpose of ensuring that the fundamental principles of the FEU Treaty are observed.

59. In my opinion, the fact that reference points were given by the Commission in Recommendation 94/79 has no bearing on whether the present action is well founded. The fact that such an act exists cannot create, on the part of the Member State concerned or the other Member States, a serious hope that the criteria set out in that recommendation, if transposed into national law, constitute a guarantee of exemption from legal proceedings, as the Republic of Estonia and several interveners suggest.

60. It is settled case-law that the procedure laid down in Article 258 TFEU is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation. The reasons that may have led the Member State responsible to act in such a way are irrelevant. [25] Therefore, in circumstances such as those of the present case, neither the principle of the protection of legitimate expectations, which has as a corollary the principle of legal certainty, nor the principle of cooperation in good faith can be relied on by a Member State in order to preclude an objective finding that it has failed to fulfil its obligations under European Union law, since to admit such justifications would run counter to the aim pursued by the action for failure to fulfil obligations. [26]

61. I would point out that the fact that a national measure may be consistent with, or at least not contrary to, a provision of secondary legislation does not have the effect of removing that measure from the scope of the provisions of the FEU Treaty, even if that provision has restrictive effects, [27] and therefore all the more so if it is not restrictive. In the present case, the fact that the Estonian law is modelled on the wording of Recommendation 94/79 seems to me to have no bearing on the assessment of whether or not the action for failure to fulfil obligations is well founded in the light of Article 45 TFEU, since the Commission does not have the power, by adopting a recommendation, to alter the scope of the obligations arising from the Treaty.

24 — See, in particular, Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 94 and case-law cited, and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 40 and case-law cited.

25 — See, in particular, Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraphs 14 and 15; Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraphs 32 and 36; and the judgment of 13 December 2007 in Case C-244/07 *Commission* v *Luxembourg*, paragraph 10.

26 — See, in particular, Case C-562/07 *Commission* v *Spain* [2009] ECR I-9553, paragraph 18 et seq. and case-law cited.

27 — Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 47 and case-law cited.

b) The defence based on the case-law of the Court

62. As a preliminary remark, I would point out that I consider that in the context of this case the Commission is not asking the Court to depart, in this regard, from precedent, such as that created in *Schumacker* in particular. [28] It is more a matter of considering whether the principles previously defined can be applied to a new situation.

63. The Court has repeatedly ruled that national provisions which preclude or deter a worker who is a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom laid down in Article 45 TFEU, even if they apply without regard to the nationality of the workers concerned. [29]

64. As far as direct taxation is concerned, there can be an obstacle as a result of discrimination against non-resident taxpayers only if their situation is objectively comparable to that of resident taxpayers for the purposes of applying the fiscal measure concerned. [30]

65. As a general rule, those two categories of persons are in different situations. Thus, the Court has held that the situation of a resident is specific in so far as the major part of his resources is usually concentrated in the Member State where he both resides and receives his income, as a result of which that State generally has all the information needed to assess the overall ability of the person concerned to pay tax, taking account of his personal and family circumstances. On the other hand, a non-resident usually concentrates the major part of his interests, both financial and personal, in a Member State other than that which intends to levy tax on his income, namely the State where he has gone to live. As those situations are not comparable, there can be no discrimination in such a context and Article 45 TFEU does not preclude, in principle, resident taxpayers from receiving more favourable tax treatment than that applied to non-residents. [31]

66. By contrast, the situations in question can be compared, and consequently there is a risk of discrimination, in the particular case where the non-resident does not receive significant income in his State of residence and derives almost all his taxable resources from an activity he carried on in the source State. In those circumstances, the State where such a taxpayer resides is not in a position to grant him the advantages resulting from account being taken of his personal and family circumstances, nor is the State in which he carried on the work which created the entitlement to the retirement pension. [32]

67. I would point out that in *Wallentin* and *Turpeinen* the State of residence had not been in a position to take account of the consequences arising from the taxpayer's individual situation since, in the first case, the income in question was, by its very nature, not taxable and, in the second case, that State did not have the tax jurisdiction required pursuant to a bilateral convention. The Court held that in such circumstances the source State was required not to apply its own tax system, namely a flat-rate withholding tax without allowances, in respect of non-residents in a way which would be likely to lead to a heavier tax burden for them than for residents.

68. This action for failure to fulfil obligations differs from that earlier case-law in that, in the present case, the taxable income of the person concerned is distributed almost 50/50 and as a result the vast majority of the income is not located in either of the Member States concerned. It is true that, in *Wallentin*, the taxpayer's situation was economically similar to that of the person who has lodged a

28 — Case C-279/93 [1995] ECR I-225.

29 — See, in particular, Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 18, and Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 15 and case-law cited.

30 — See, in particular, Case C-562/07 *Commission* v *Spain*, paragraph 59, and Case C-440/08 *Gielen* [2010] ECR I-2323, paragraph 44 et seq.

31 — See Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraph 15 et seq. and case-law cited; *Turpeinen*, paragraph 27 and case-law cited; and Case C-329/05 *Meindl* [2007] ECR I-1107, paragraph 23 and case-law cited.

32 — See *Zurstrassen*, paragraphs 22 and 23 and case-law cited; *Wallentin*, paragraph 17 and case-law cited; *Turpeinen*, paragraph 28 and case-law cited; and Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 61 and case-law cited.

complaint with the Commission here, since that person received income of a similar amount in two Member States, but the situation was formally different, since the person concerned had taxable income only in the source State because the financial assistance he received in the State of residence was, by its very nature, not subject to taxation.

69. In my opinion, the most atypical element of the facts of the present case is that these proceedings relate to the situation of a person who is not in the labour force but who has accumulated pension rights in different Member States, without one pension being significantly larger than another, and not to the situation of a person in the labour force who has worked in two Member States during the tax year in question, as was the situation in most of the cases which the Court has been asked to examine to date.

70. International conventions in the field of income tax provide interesting guidance for the removal of obstacles which hinder the movement of persons across borders, in particular employees, to whom pensioners may be assimilated. It seems to me that, in international tax law, income from retirement pensions is treated as a separate category from other forms of income.

71. By way of illustration, Article 18 of the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD),[33] which relates to 'pensions',[34] provides, in that respect, for model rules worded as follows: '[s]ubject to the provisions of paragraph 2 of Article 19 [concerning government service], pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State'. The authors of that convention have drawn from the same general view of fiscal policy as that seen in *Schumacker*. As far as retired taxpayers are concerned, this position is based, in my view, on two reasons: first, the State of residence is best placed to have all the information needed concerning the personal circumstances of the person concerned, and, secondly, pensioners are often people who generate supplementary charges for the country in which they reside.[35]

72. Following the direction taken in this international convention, I take the view that the situation of pensioners is different from that of workers, whose treatment may change depending on their place of work and whose income is generally higher, and that it is therefore appropriate to apply rules specific to income from pensions. The Court's earlier case-law principally concerns the situation of workers who have carried on jobs in different Member States during the tax year under consideration, whereas the present case concerns a person who is not in the labour force and who has accumulated, throughout his career and therefore over several years, rights to retirement pensions in two Member States. In this case, I take the view that it is not a matter of considering whether the situations of residents and non-residents are comparable in relation to a given tax year, as was the situation in the cases concerning workers. The situation at issue continues today, and will continue in years to come, since the person concerned no longer works and no longer moves around.

73. In my view, an analysis of whether such situations are comparable must not be carried out in an abstract manner, but should take account of the purpose of the national provisions concerned. That purpose makes it possible to determine whether or not the difference in treatment of a cross-border nature relates to situations which are objectively comparable.[36]

74. As the Commission points out, the Estonian law seeks to exempt taxpayers whose income is too low from the obligation to participate in funding public expenditure.

33 — Model Tax Convention on Income and on Capital, condensed version, OECD, 8th ed., July 2010 (http://dx.doi.org/10.1787/mtc_cond-2010-en).

34 — I note that the authors of Recommendation 94/79 stated that they drew from the provisions of that convention, at least as regards the definitions used in that act for the income categories (third paragraph of point 12 of the explanatory memorandum). Member States have also drawn on the convention: see Case C-470/04 *N* [2006] ECR I-7409.

35 — To be compared with the Commentary on Article 18 of the OECD Model Tax Convention, op. cit., p. 276, paragraph 1.

36 — Case C-319/02 *Manninen* [2004] ECR I-7477, paragraphs 32 and 33.

75. In practice, in the case of pensioners, that follows from the combined application of the personal allowance, provided for by Paragraph 23 of the Estonian Law on income tax, and the supplementary allowance in the case of a pension, provided for by Paragraph 23^2 of that law. Everyone with a low income benefits from the first allowance, but only retired taxpayers are able to benefit from the second. Clearly, the exemption resulting from the application of that supplementary allowance is justified by the fact that pensioners, in view of their age or their state of health, are generally outside the labour market and, consequently, unable to increase their income.

76. It must be stated that a retired taxpayer's capacity to contribute towards funding the Republic of Estonia's public expenditure does not increase just because he has moved to another Member State. For that reason, I concur with the Commission's view that non-resident retired taxpayers who have a modest income are in a situation comparable to that of persons living in Estonia, despite the difference in respect of their residence.

77. The main question being asked here is whether there is a restriction in cases where income which should not be taxable, either according to the legislation of the source Member State or according to that of the Member State of residence, is taxed only because the taxpayer has exercised his freedom of movement in such a way that as a result he receives two pensions of almost the same amount. It is, indeed, possible that a taxpayer's situation may be impaired if he chooses not to return to his Member State of origin after having stopped work in another Member State. I think that such circumstances are likely to arise fairly frequently in the case of nationals of Member States which acceded to the European Union in 2004 or 2007.

78. The Commission demonstrates good sense when it submits that the Republic of Estonia should calculate whether the non-resident retired taxpayer would be eligible for the allowance in the scenario where his Finnish income were added to his Estonian income.

79. An obstacle to the freedom of movement for workers is not created by taxing a pension per se, even if the Estonian pension in question would not be taxed in the same way in Finland, given that it is a small amount. However, the obstacle exists as a result of the tax consequences of the combination of the two pensions, which are of almost the same amount, because the Republic of Estonia is levying more tax on one pension than it would have done if the taxpayer concerned had resided in the national territory or if that pension had represented at least 75% of the taxpayer's worldwide income. Therefore, the Estonian law penalises individuals who make use of their freedom of movement in several Member States to work in several Member States in turn without returning to live in Estonia.

80. I do not think that the Member State in which an individual receives a pension is required systematically to examine the worldwide income of the person concerned, but I do take the view that if a citizen of the European Union has made use of his freedom of movement under Article 45 TFEU and has a right to a pension in that Member State on account of having worked and resided there, he must be considered to be in a situation comparable to that of taxpayers who still reside in that State on the day of the taxation and therefore be entitled to equal treatment.

81. In my view, there is no justification for such an obstacle when the Member State of residence already takes into account the total income of the person concerned. In this situation, there are no circumstances which would enable a person in receipt of income from two Member States to abuse the tax system, particularly the possibility of receiving two allowances, to avoid any taxation whatever of his income.

82. I note that, in practice, the complainant has, it seems, resources close to the social minima. It seems to me to be objectively unthinkable that an individual with such modest income is liable in Estonia to standard taxation, that is to say, without the possibility of receiving the allowances provided for by the national legislation.

83. Accordingly, I propose, in the alternative, that the Court should declare that the failure to fulfil obligations with which the Republic of Estonia is charged has been made out on the basis of Article 45 TFEU.

2. Infringement of Article 28 of the EEA Agreement

84. Article 28 of the EEA Agreement provides that the States must ensure that freedom of movement for workers is observed within the European Economic Area, in other words, the 27 Member States of the European Union and the three of four EFTA States which have acceded to that agreement.

85. The Commission complains that the Republic of Estonia has not complied with the commitments made under that article of the EEA Agreement for the same reasons as in the case of the alleged infringement of Article 45 TFEU.

86. In its statement in defence, the Republic of Estonia points out that it retains the point of view it expressed in its response to the Commission's reasoned opinion, namely that its Law on income tax is not contrary to Article 28 of the EEA Agreement. It considers, in that respect, that the different treatment accorded to non-residents which has been pointed out by the Commission is both relevant and justified in relation to that provision, in the same way as it is in relation to Article 45 TFEU.

87. However, it is common ground that the Republic of Estonia has admitted that it has failed to fulfil the obligations contained in Article 28 of the EEA Agreement, in contrast to those contained in Article 45 TFEU. It has agreed that Paragraph 28^3 of its Law on income tax must be supplemented, in order to extend the scope of that provision to include nationals of all the States parties to the EEA Agreement. However, the Republic of Estonia did not take steps to do so before expiry of the two-month period prescribed in the reasoned opinion.

88. It follows that, although the Republic of Estonia has continued to contest the alleged infringement in relation to the content of the obligations contained in Article 28 of the EEA Agreement, it has recognised, if only in part, that there is a failure to fulfil obligations in this respect, by stating that it would seek to remedy it by amending the law at issue. It has, thus, accepted that the Commission's action is well founded to that extent.

89. Moreover, since the provisions of Article 28 of the EEA Agreement have the same legal scope as the provisions, identical in substance, of Article 45 TFEU, the foregoing considerations concerning the infringement of the latter provisions can be applied *mutatis mutandis* to Article 28, in accordance with Article 6 of the EEA Agreement and with the need for a uniform interpretation which has been recognised both by the Court of Justice and by the EFTA Court.[37]

VI – Costs

90. 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.

91. The Republic of Estonia asked that the Commission be ordered to pay the costs. If, as I propose primarily, the action for failure to fulfil obligations is declared inadmissible, this claim must be upheld.

37 — See Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 39 et seq.; Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 31 et seq.; and Case C-155/09 *Commission* v *Greece* [2011] ECR I-65, paragraph 61 et seq.; and, by analogy, Case C-562/07 *Commission* v *Spain*, paragraph 67.

92. As the Commission has claimed that the Republic of Estonia should be ordered to pay the costs, this claim must be upheld if the action for failure to fulfil obligations is allowed and if, as I propose in the alternative, that Member State is essentially unsuccessful.

93. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States which have requested leave to intervene in the present proceedings are to bear their own costs.

VII – Conclusion

94. In the light of the foregoing, I propose that the Court rule as follows:

(1) The Court declares that the action for failure to fulfil obligations brought by the European Commission seeking a declaration that, by applying the national Law on income tax, the Republic of Estonia has failed to fulfil its obligations under Article 45 TFEU and Article 28 of the Agreement on the European Economic Area of 2 May 1992 is inadmissible.

(2) The European Commission is ordered to pay the costs.

(3) The Federal Republic of Germany, the Kingdom of Spain, the Portuguese Republic, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland are to bear their own costs.

95. In the alternative, in the event that the Court does not concur with that proposal, I suggest that it rule as follows:

(1) The Court declares that the Republic of Estonia has failed to fulfil its obligations under Article 45 TFEU and Article 28 of the Agreement on the European Economic Area of 2 May 1992 by retaining in force its Law on income tax, as a consequence of which non-resident pensioners who have worked and resided both in Estonia and in another Member State are eligible for an allowance for low incomes only if they receive at least 75% of their taxable income in Estonia, whereas that tax relief would be granted to them if they resided in the national territory. The Court rejects the Commission's action for failure to fulfil obligations for the remainder in so far as it concerns other categories of non-resident taxpayers.

(2) The Republic of Estonia is ordered to pay the costs.

(3) The Federal Republic of Germany, the Kingdom of Spain, the Portuguese Republic, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland are to bear their own costs.