Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

30 May 2024*

(Reference for a preliminary ruling – Agreement between the European Union and the Swiss Confederation on the free movement of persons – Worker from a Member State who has transferred his residence to Switzerland – Tax concessions – Income tax – 'Voluntary assessment' mechanism – Taxpayers who may benefit therefrom – Restriction to partially taxable employed persons resident in a Member State or in a State party to the Agreement on the European Economic Area (EEA) – Equal treatment)

In Case C-627/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court, Cologne, Germany), made by decision of 20 September 2022, received at the Court on 4 October 2022, in the proceedings

AB

v

Finanzamt Köln-Süd,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the European Commission, by B.-R. Killmann and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2023,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6), as last adapted by the Protocol of 4 March 2016 regarding the participation of the Republic of Croatia as a Contracting Party, following its accession to the European Union (OJ 2017 L 31, p. 3) ('the AFMP').

2 The request has been made in proceedings between AB and the Finanzamt Köln-Süd (Tax Office, Cologne-South, Germany) ('the tax authority') concerning the calculation of income tax for the tax period corresponding to the years 2017 to 2019 ('the period at issue in the main proceedings').

Legal context

The AFMP

3 The European Community and its Member States, of the one part, and the Swiss Confederation, of the other, signed seven agreements on 21 June 1999, including the AFMP. By Decision 2002/309/EC, Euratom, of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1), those seven agreements were approved on behalf of the European Community and entered into force on 1 June 2002.

4 According to the preamble of the AFMP, the Contracting Parties are 'resolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

5 Article 1 of the AFMP states:

'The objective of this Agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is:

(a) to accord a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties;

…

(c) to accord a right of entry into, and residence in, the territory of the Contracting Parties to persons without an economic activity in the host country;

(d) to accord the same living, employment and working conditions as those accorded to nationals.'

6 Article 2 of that agreement, entitled 'Non-discrimination', provides:

'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

7 Article 4 of that agreement, entitled 'Right of residence and access to an economic activity', is worded as follows:

'The right of residence and access to an economic activity shall be guaranteed … in accordance with the provisions of Annex I.'

8 Article 6 of the AFMP provides:

'The right of residence in the territory of a Contracting Party shall be guaranteed to persons not pursuing an economic activity in accordance with the provisions of Annex I relating to non-active people.'

9 Under Article 7 of that agreement, entitled 'Other rights':

'The Contracting Parties shall make provision, in accordance with Annex I, for the following rights in relation to the free movement of persons:

(a) the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions;

…'

10 Article 10 of that agreement, entitled 'Transitional provisions and development of the Agreement', provides, inter alia, in paragraphs 1 to 1c thereof, for the right of the Swiss Confederation and certain Member States to maintain quantitative limits in respect of access to an economic activity for certain categories of residence and for a certain period, in paragraphs 2 to 2c thereof, for the right of the Contracting Parties to maintain, for a certain period, controls on the priority of workers integrated into the regular labour market and wage and working conditions applicable to nationals of the other Contracting Party, and, in paragraphs 3 to 3c thereof, for the right of the Swiss Confederation to reserve, within its overall quotas, minimum amounts of new residence permits for employed and self-employed persons of the European Union.

11 Article 13 of that agreement, entitled 'Standstill', provides:

'The Contracting Parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals in fields covered by this Agreement.'

12 Under Article 15 of the AFMP, the annexes and protocols thereto are to form an integral part thereof.

13 Article 16 of that agreement, entitled 'Reference to Community law', is worded as follows:

'1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the

legal acts of the European Community to which reference is made are applied in relations between them.

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

14 Article 21 of that agreement provides:

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

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

3. No provision of this Agreement shall prevent the Contracting Parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under their national tax legislation or agreements aimed at preventing double taxation between Switzerland, of the one part, and one or more Member States of the European Community, of the other part, or any other tax arrangements.'

15 Annex I to the AFMP concerns the free movement of persons.

16 Article 6(1) of that Annex I provides:

'An employed person who is a national of a Contracting Party (hereinafter referred to as "employed person") and is employed for a period of one year or more by an employer in the host state shall receive a residence permit which is valid for at least five years from its date of issue …'

17 Article 7(1) of that Annex I states:

'An employed frontier worker is a national of a Contracting Party who has his residence in the territory of a Contracting Party and who pursues an activity as an employed person in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week.'

18 Article 8 of that Annex I provides:

'1. Employed persons shall have the right to occupational and geographical mobility throughout the territory of the host state.

2. Occupational mobility shall include changes of employer, employment or occupation and changing from employed to self-employed status. Geographical mobility shall include changes in the place of work and residence.'

19 Article 9 of Annex I to the AFMP, entitled 'Equal treatment', provides, in paragraphs 1 and 2 thereof:

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

2. An employed person and the members of his family … shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.'

20 Under Article 24 of that Annex I:

'1. A person who is a national of a Contracting Party not pursuing an economic activity in the state of residence and having no right of residence pursuant to other provisions of this Agreement shall receive a residence permit valid for at least five years provided he proves to the competent national authorities that he possesses for himself and the members of his family:

(a) sufficient financial means not to have to apply for social assistance benefits during their stay;

(b) all-risks sickness insurance cover …

…'

German law

21 The Einkommensteuergesetz (Law on income tax), in the version applicable to the dispute in the main proceedings (BGBl. 2009 I, p. 3366) ('the EStG'), provides, in Paragraph 1 thereof, entitled 'Liability to tax':

'1. Natural persons who have a place of residence or their habitual abode in Germany shall be fully liable to income tax. …

…

4. Natural persons who do not have their place of residence or their habitual abode in Germany shall, subject to subparagraphs 2 and 3 and to Paragraph 1a, be liable to a limited extent to income tax if they are in receipt of domestic earnings within the meaning of Paragraph 49.

…'

22 Paragraph 9(1) of the EStG is worded as follows:

'Occupational expenses are expenses incurred in the acquisition, safeguarding and maintenance of income. They must be deducted from the category of income in which they were generated. …'

23 Under Paragraph 39a of the EStG, entitled 'Allowance and increase in respect of the non-taxed portion of additional wages':

'(1) At the request of an employed person who is fully liable to income tax, the tax authority shall calculate the total amount of the allowance to be deducted from his salary by adding together the following amounts:

1. The occupational expenses incurred in respect of income from employment, where they exceed the employee lump sum allowance (point 1(a) of the first sentence of Paragraph 9a), …

…

(2) The employee shall submit the request referred to in subparagraph 1 on the pre-printed administrative form provided for that purpose, which he shall sign by his own hand. The time limit for submitting that request shall begin to run on 1 October of the year preceding that to which the allowance is to be applied. That time limit shall expire on 30 November of the calendar year in which the allowance applies. …

…

(4) In the case of an employed person who is partially liable to income tax, to whom the fourth sentence of Paragraph 50(1) applies, the tax authority shall, on request, determine an allowance to be deducted from the total salary on the basis of the sum of the following amounts:

1. the occupational expenses incurred in order to earn income from employment, …

…

The request may be submitted only on the form prescribed by the authority until the end of the calendar year to which the details specific to withholding wage tax at source apply.'

24 Points 4 and 8 of Paragraph 46(2) of the EStG, and Paragraph 46(4) thereof, are worded as follows:

'(2) Where the income consists, in whole or in part, of income from employment which has been subject to withholding tax at source, it shall be subject to taxation only:

…

4. where, for a given taxpayer, an allowance within the meaning of points 1 to 3, 5 or 6 of the first sentence of Paragraph 39a(1) of the EStG has been determined and the total salary received during the calendar year exceeds EUR 11 600 [EUR 11 200 for 2017 and EUR 11 400 for 2018], …; the same rule shall apply to taxpayers belonging to the category of persons defined in Paragraph 1(2) or to employed persons who are partially liable to income tax, where those records appear on a tax certificate issued for the purpose of withholding tax (first sentence of Paragraph 39(3));

…

8. if taxation is requested, in particular for the purpose of offsetting wage tax against income tax. The request must be made by filing an income tax return.

…

(4) If the application of the taxation regime under subparagraph 2 is excluded, the income tax due on income from employment shall be deemed to have been paid by the taxpayer by means of the amount withheld from his salary by way of wage tax, provided that it cannot be used to offset an underpayment of wage tax. …'

25 Paragraph 49 of the EStG, entitled 'Partially taxable income', provides, in subparagraph 1 thereof:

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

…

4. income from employment (Paragraph 19)

(a) which is, or has been, carried out or performed in Germany,

…

…'

26 Paragraph 50 of the EStG, which contains specific provisions relating to persons partially liable to income tax, provides:

'(1) Persons partially liable to income tax may deduct the deductible expenses referred to in Paragraph 4(4) to (8) or the occupational expenses referred to in Paragraph 9 only in so far as those expenses have an economic link with domestic earnings. …

(2) Income tax on earnings subject to the withholding of wage tax at source … shall, in the case of taxpayers partially liable to tax, be deemed to have been paid by the withholding of that tax. The first sentence shall not apply:

…

4. to income from employment within the meaning of point 4 of Paragraph 49(1),

(a) in the event of the establishment of an allowance as a detail specific to withholding wage tax at source in accordance with Paragraph 39a(4), or

(b) in the event of a request for an income tax assessment (point 8 of Paragraph 46(2));

…

… Point 4(b) of the second sentence [shall apply] only to nationals of a Member State of the European Union or of another State to which the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement')] applies who have their place of residence or habitual abode in the territory of one of those States. …'

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

27 During the period at issue in the main proceedings, AB, a German national, worked as a manager on behalf of a German company established in Z (Germany) and derived income from that employment, while having his place of residence and habitual abode in Switzerland. AB carried out his activities while teleworking from his home in Switzerland and as part of business trips to Germany.

28 It is apparent from the request for a preliminary ruling that AB moved from Germany to Switzerland in April 2016 for family reasons connected with his wife taking up employment in that State and that his move to Switzerland was properly carried out under a residence permit.

29 During the period at issue in the main proceedings, AB was partially liable to tax in Germany, in accordance with Paragraph 1(4) of the EStG. AB's entire salary was subject to wage tax that was withheld at source and then paid to the tax authority by his employer.

30 AB used a leased motor vehicle, not provided by the employer, for his business travel and incurred, in particular, his own expenses relating to that vehicle as well as other travel expenses. During the period at issue in the main proceedings, he did not have any allowance recorded by the tax authority.

31 In addition to his income from employment, AB received income from the rental and leasing of two properties situated in Germany.

32 In his income tax returns for the period at issue in the main proceedings, which were filed with the tax authority, AB declared, in addition to income from rental and leasing, income from employment. As regards the 2017 tax year, he indicated that, out of gross income from employment totalling EUR 113 299.41, a gross salary of EUR 63 651 corresponded to activities carried out in Germany and was taxable there. As regards the 2018 tax year, out of gross income from employment totalling EUR 115 498.41, a gross salary of EUR 60 932 corresponded to activities carried out in Germany and, as regards the 2019 tax year, out of gross income from employment totalling EUR 115 314.91, a gross salary of EUR 57 429 corresponded to activities carried out in Germany.

33 In those returns, AB claimed, as expenses contributing to the reduction of the amount of tax, occupational expenses, namely expenses linked to a taxable activity in Germany, and submitted a request for an income tax assessment, in accordance with point 4(b) of the second sentence of Paragraph 50(2) of the EStG, read in conjunction with the seventh sentence of Paragraph 50(2) thereof ('voluntary assessment').

34 In the notices of assessment relating to the period at issue in the main proceedings, the tax authority used only the income from rental and leasing as a basis for calculating income tax, taking the view that tax on income from employment had already been paid by means of the amount withheld at source in accordance with the first sentence of Paragraph 50(2) of the EStG. Consequently, neither the German wage tax already paid nor the solidarity surcharge was offset against the calculated amount of German income tax. The tax authority denied voluntary assessment on the ground that it was limited to workers who had their place of residence or habitual abode in an EU Member State or in a State party to the EEA Agreement.

35 After AB's complaints against those notices of assessment were rejected by decisions of 25 February 2020 and 15 November 2021, AB brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), the referring court, seeking to be granted voluntary assessment with a distribution of his salary between the Federal Republic of Germany and the Swiss Confederation, which differs from the withholding of wage tax at source, and to have his occupational expenses taken into account.

36 According to AB, the denial of voluntary assessment in the event of residence in Switzerland is contrary to the AFMP in view, in particular, of the judgment of 26 February 2019, *Wächtler* (C-581/17, EU:C:2019:138), infringes the right to equal treatment as regards tax concessions, provided for in Article 9(2) of Annex I to the AFMP, and cannot be justified. AB adds that the standstill clause laid down in Article 13 of the AFMP cannot be relied on either. According to AB, the possibility of opting to record an allowance as a detail specific to withholding wage tax at source ('recording the allowance') does not remove the unequal treatment or constitute grounds for justification. Recording the allowance must be requested before the end of the tax period, without knowing exactly whether and to what extent that would be profitable, and requires the compulsory filing of an income tax return within a specified period whereas, in the case of voluntary assessment, there is simply a four-year assessment period.

37 The tax authority contends, first of all, that, even if AB were to fall within the personal scope of the AFMP and of Annex I thereto, which that authority doubts, the rights agreed in the AFMP do not coincide with the fundamental freedoms guaranteed by the FEU Treaty. Next, it follows from the standstill clause laid down in Article 13 of the AFMP that there is a right to maintain all restrictions existing on the date of signature of the AFMP. The discharging effect of having wage tax withheld at source, provided for by the EStG, in respect of income from employment in the case of persons partially liable to tax in accordance with the first sentence of Paragraph 50(2) of the EStG already applied on that date.

38 Last, the tax authority argues that any unequal tax treatment is justified, in accordance with Article 21(2) and (3) of the AFMP. The possibility, in the wage tax procedure, of claiming occupational expenses and other elements that contribute to reducing tax by recording the allowance militates against the existence of discrimination. That authority submits that, according to the Court's case-law, the existence of different tax procedures does not constitute an infringement of the fundamental freedoms (judgment of 22 December 2008, *Truck Center*, C-282/07, EU:C:2008:762) and, unlike the situation at issue in the case that gave rise to the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraphs 53 and 54), the allowance procedure for the purposes of wage tax and the subsequent compulsory assessment procedure made it possible, in the case at issue in the main proceedings, to deduct occupational expenses.

39 The referring court states that, under point 4(a) of Paragraph 49(1) of the EStG, income from employment which is, or has been, carried out or performed on national territory, that is to say, in Germany, constitutes domestic earnings for the purposes of partial tax liability and that it is common ground in the main proceedings that only the salary corresponding to the activity carried out in Germany, on the basis of the distribution of working days, is subject to income tax in Germany.

40 That court states that, under the first sentence of Paragraph 50(2) of the EStG, tax on income from employment is, in principle, deemed to have been paid by virtue of having been withheld at source from pay. That withholding is carried out, in principle, on the basis of gross salary and, where

appropriate, lump-sum amounts of withholding tax. However, in accordance with the EStG, having less wage tax withheld at source is possible through recording the allowance, which may be requested by any employed person who is partially liable to income tax, including those residing in Switzerland, by means of a form prescribed by the tax authority and filed in good time before the end of the calendar year.

41 In the event of recording the allowance, the discharging effect of the withholding tax is excluded by virtue of point 4(a) of the second sentence of Paragraph 50(2) of the EStG, and the taxpayer must undertake a taxation procedure (compulsory assessment) in which income is calculated independently of the values used in the wage tax procedure and income tax is calculated by offsetting, inter alia, the wage tax already paid. Recording too high an allowance could lead to additional assessments which the tax authority would then have to claim from the taxpayer resident abroad. However, in the case of higher occupational expenses than the allowance claimed in the taxation procedure or, for example, of income which is only partially taxable, there could also be a right to a refund. The taxpayer would also be under an obligation to file a tax return and, failing that, could be subject to an *ex officio* calculation in which the tax bases are estimated, to a late payment surcharge or to a warning that a penalty payment of a set amount may be imposed.

42 Apart from recording the allowance, nationals of a Member State of the European Union or of another State party to the EEA Agreement, who have their place of residence or habitual abode in the territory of one of those States, could opt for voluntary assessment under point 4(b) of the second sentence of Paragraph 50(2) of the EStG and point 8 of Paragraph 46(2) thereof. The referring court states that filing the tax return is equivalent to exercising the right of option and the taxpayer may freely decide, within the four-year assessment period, whether he or she wishes to file an income tax return, which, according to that court, he or she would do only if the wage tax paid is higher than the income tax calculated.

43 That court adds that Paragraph 46 of the EStG, concerning voluntary assessment for national workers, has been in force for decades, whereas the right to voluntary assessment of nationals of Member States and other States party to the EEA Agreement who are resident in those States has been in force since 1 January 1997 and was introduced in response to the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31).

44 The referring court states that, if the AFMP were to be interpreted as precluding the limitation of voluntary assessment to taxpayers who reside in another Member State or in another State party to the EEA Agreement, voluntary assessment would have to be carried out for the period at issue in the main proceedings, with the result that occupational expenses would be taken into account in favour of the applicant in the main proceedings and the German wage tax would be offset. That would result in a significant tax refund for AB.

45 In those circumstances, the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are the provisions of the [AFMP], in particular Articles 7 and 15 of the AFMP, read in conjunction with Article 9(2) of Annex I to the AFMP (right to equal treatment), to be interpreted as precluding legislation of a Member State under which employees who are nationals of an EU [Member State or a State party to the EEA Agreement] (including [the Federal Republic of] Germany) and who reside (with their place of residence or habitual abode) in Germany or in [an EU Member State or a State party to the EEA Agreement] may voluntarily

apply for an assessment of income tax that takes into account income from employment that is taxable in Germany ("voluntary assessment"), in particular in order to receive an income tax refund allowing for expenses (income-related expenses) and crediting German wage tax withheld as part of the tax deduction procedure, but that right is denied to German and Swiss nationals residing in Switzerland?'

Consideration of the question referred

46 By its question, the referring court asks, in essence, whether Articles 7 and 15 of the AFMP, read in conjunction with Article 9(2) of Annex I to the AFMP, must be interpreted as precluding legislation of a Member State that reserves to taxpayers who are nationals of that Member State, of another Member State or of a State party to the EEA Agreement and who reside in the territory of one of those States the right to opt for a voluntary assessment procedure in respect of income from employment in order to have expenses such as occupational expenses taken into account and to have the wage tax that has been withheld in the withholding tax procedure offset, which may lead to an income tax refund, and that does not confer such a right of option on, inter alia, a national of the first Member State who resides in Switzerland and who receives income from employment in that Member State.

Preliminary observations

47 As a preliminary point, it must be borne in mind that, since the AFMP is an international treaty, it must be interpreted, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331), in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Further, it follows from that provision that a term will be understood to have a special meaning if it is shown that that was the intention of the parties (judgment of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 35 and the case-law cited).

48 The Court has already stated, in the first place, that the AFMP falls within the more general framework of relations between the European Union and the Swiss Confederation. Although the Swiss Confederation does not participate in the European Economic Area and in the European Union's internal market, it is nevertheless linked to the European Union by numerous agreements covering vast fields and prescribing specific rights and obligations, analogous, in some respects, to those laid down by the Treaty. The general objective of those agreements, including the AFMP, is to strengthen the economic ties between the European Union and the Swiss Confederation (judgments of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643, paragraph 33, and of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 36).

49 However, as the Swiss Confederation has not joined the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot automatically be applied to the interpretation of the AFMP, unless there are express provisions to that effect laid down by that agreement itself (judgments of 15 March 2018, *Picart*, C-355/16, EU:C:2018:184, paragraph 29, and of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 37).

50 As regards, in the second place, the objective pursued by the AFMP and the interpretation of its terms, the Court has held that it is clear from the preamble, Article 1 and Article 16(2) of the AFMP that the aim of that agreement is to secure, for natural persons who are EU nationals or nationals of the Swiss Confederation, the free movement of persons in the territory of those

parties based on the rules applying within the European Union, the terms of which must be interpreted in accordance with the relevant case-law of the Court prior to the date of signature of that agreement. As regards case-law after that date, Article 16(2) of the AFMP provides, first, that that case-law must be brought to the attention of the Swiss Confederation and, second, that, in order to ensure that the AFMP works properly, at the request of a Contracting Party, the Joint Committee provided for in Article 14 of the AFMP is to determine the implications of such case-law. That said, even where no determination is made by that committee, that case-law should also be taken into account in so far as it does no more than clarify or confirm the principles established in the case-law in existence on the date of signature of the AFMP in relation to concepts of EU law which inform that agreement (judgment of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraphs 38 and 39).

51 It is in accordance with those principles and in the light of those considerations that the terms of the AFMP must be interpreted in order to determine, in the first place, whether a situation such as that at issue in the main proceedings falls within the scope of that agreement and, if so, in the second place, whether those terms preclude legislation such as that at issue in the main proceedings.

The applicability of the AFMP

52 It should be noted, first of all, that, according to the preamble and Article 1(a) and (c) of the AFMP, the scope of that agreement extends to natural persons who are nationals of the Member States of the European Union and the Swiss Confederation, whether or not they pursue an economic activity (see, to that effect, judgment of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 41).

53 Next, it is apparent from the wording of Article 1(a), (c) and (d) of the AFMP that that agreement is intended to accord those nationals, inter alia, a right of entry, residence, access to work as employed persons and the same living, employment and working conditions as those accorded to nationals of the individual states in question (judgment of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 37).

54 In that regard, the Court has already stated that the AFMP guarantees, in Article 4 thereof, the right of access to an economic activity in accordance with the provisions of Annex I to that agreement, Chapter II of that Annex I containing provisions on freedom of movement for employed persons, in particular those relating to the principle of equal treatment (judgment of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 38). Furthermore, Article 7(a) of the AFMP provides that the Contracting Parties are to make provision, in accordance with Annex I, inter alia, for the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions.

55 Last, Article 2 of the AFMP provides that nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party are not, in application of and in accordance with the provisions of Annexes I to III to that agreement, to be the subject of any discrimination on grounds of nationality. The principle of non-discrimination set out in that article applies provided that the situation of those nationals falls within the material scope of the provisions of Annexes I to III to the AFMP (see, to that effect, judgment of 15 July 2010, *Hengartner and Gasser*, C-70/09, EU:C:2010:430, paragraph 39).

56 In the present case, it is apparent from the request for a preliminary ruling that, during the period at issue in the main proceedings, AB carried out his activities for an employer established in Germany while teleworking from his home in Switzerland and as part of business trips to Germany, and derived income from that employment; he disputes the tax treatment thereof by that Member State.

57 It is also apparent from the information provided by the referring court that the taxation in Germany relates only to the salary corresponding to the activity carried out in Germany, on the basis of the distribution of working days.

58 Thus, as a German national who is lawfully resident in Swiss territory, AB falls within the category of persons referred to in Articles 1 and 2 of the AFMP. It must also be ascertained whether AB's situation falls within the material scope of Annex I to the AFMP which, in accordance with Article 15 of the AFMP, forms an integral part of that agreement and which lays down provisions relating to the free movement of persons, in particular to employed persons.

59 It should be noted that the scope *ratione personae* of the concept of 'employed person', within the meaning of the AFMP, is defined in Articles 6 and 7 of Annex I to that agreement (see, by analogy, judgments of 15 March 2018, *Picart*, C-355/16, EU:C:2018:184, paragraph 18, and of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 47).

60 Under Article 6 of that Annex I, a national of a Contracting Party who is employed by an employer in the host State is to be regarded as an employed person.

61 Article 7(1) of that Annex I defines an employed frontier worker as a national of a Contracting Party who has his or her residence in the territory of a Contracting Party and who pursues an activity as an employed person in the territory of the other Contracting Party, returning to his or her place of residence as a rule every day, or at least once a week.

62 That provision draws a distinction between the place of residence, situated in the territory of one Contracting Party, and the place where a paid activity is pursued, which must be in the territory of the other Contracting Party, irrespective of the nationality of the person concerned (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 33 and the case-law cited).

63 It must be stated that Article 7(1) of Annex I to the AFMP may apply to AB's situation. AB is a national 'of a Contracting Party', namely the Federal Republic of Germany, is resident in the territory 'of a Contracting Party', in the present case the Swiss Confederation, and pursues a paid activity as an employed person in the territory 'of the other Contracting Party', namely the Federal Republic of Germany (see, to that effect, judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 32).

64 It is, however, for the referring court to determine whether the condition of returning to the place of residence, laid down in Article 7(1) of Annex I to the AFMP, is satisfied in the situation at issue in the main proceedings.

65 If the referring court reaches the conclusion that, on account of stays in German territory, without returning to his place of residence, that are longer than those referred to in Article 7(1) of Annex I to the AFMP, AB cannot be classified as an 'employed frontier worker', he may, however, rely on the AFMP as an 'employed person' within the meaning of the AFMP.

66 In a situation characterised by the fact that AB, a German citizen, is resident in Switzerland and that he works as an employed person in German territory for an employer established in Germany, the wording of Article 6 of Annex I to the AFMP does not preclude the latter State from being regarded as the 'host State' within the meaning of Article 6 et seq. of that Annex I, or preclude AB from being regarded as an 'employed person' there, within the meaning of Chapter II of Annex I to the AFMP, that is to say, as a national of a Contracting Party who is employed by an employer in the host State, which is, in the present case, also the State of origin of that national.

67 Such a conclusion is supported by the scheme of Chapter II of Annex I to the AFMP, by its general objectives and by the provisions of Article 6 of the AFMP and Article 24(1) of Annex I to the AFMP, which lay down a right of residence, namely the right of nationals of one Contracting Party to establish their residence in the territory of the other Contracting Party regardless of the pursuit of an economic activity.

68 Thus, although the provisions of Article 6 of Annex I to the AFMP, relating to residence permits, of Article 8 of that Annex I, relating to occupational and geographical mobility, and of Article 10 of that Annex I, providing for the option of refusing nationals of a Contracting Party the right to take up employment in the public service which involves the exercise of public power, do not confer additional rights on employed persons in the host State of which they are nationals and cannot be relied on against them, that is not the case with Article 9 of Annex I to the AFMP, entitled 'Equal treatment', which ensures the application of the principle of non-discrimination set out in Article 2 of the AFMP in the area of the free movement of workers (see, by analogy, judgments of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 47, and of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 39).

69 The Court has already held that it is possible that nationals of a Contracting Party may also claim rights under the AFMP against their own country, in certain circumstances and in accordance with the provisions applicable (judgment of 28 February 2013, *Ettwein*, C-425/11, EU:C:2013:121, paragraph 33 and the case-law cited).

70 As regards employed persons, the Court has held, inter alia, that Article 9 of Annex I to the AFMP, which lays down, in paragraph 2 thereof, a specific rule intended to provide the employed person and the members of his or her family with the same tax concessions and welfare benefits as those available to national employed persons and members of their family, may be relied on by a worker who is a national of a Contracting Party and has exercised his or her right to freedom of movement, with regard to his or her State of origin (see, to that effect, judgments of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 36, and of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 40).

71 The situation of an employed person, such as AB, who has exercised his right to freedom of movement by transferring his residence from Germany to Switzerland and who is employed in his State of origin, which is also his host State, is comparable to the situation, examined by the Court in the case that gave rise to the judgment of 19 November 2015, *Bukovansky* (C-241/14, EU:C:2015:766), of a German frontier worker who transferred his residence from Germany to Switzerland while retaining his place of employment in the first State.

72 Moreover, it is apparent from the case-law of the Court that the provisions of Chapter II of Annex I to the AFMP and, in particular, the principle of equal treatment apply in the same way to employed persons and to employed frontier workers without making any distinction between them in that regard (see, to that effect, judgment of 22 December 2008, *Stamm and Hauser*,

C-13/08, EU:C:2008:774, paragraph 42), the special situation of employed frontier workers being taken into account in Article 7 of Annex I to the AFMP (see, by analogy, judgment of 28 February 2013, *Ettwein*, C-425/11, EU:C:2013:121, paragraphs 37 and 38).

73 In addition, as has been recalled in paragraphs 52 and 53 of the present judgment, the aim of the AFMP is to allow natural persons who are nationals of the Member States of the European Union and the Swiss Confederation to benefit from free movement in the territory of those parties to the AFMP.

74 Furthermore, Article 6 of the AFMP and Article 24(1) of Annex I to the AFMP lay down a right of residence, namely the right of nationals of one Contracting Party to establish their residence in the territory of the other Contracting Party regardless of the pursuit of an economic activity.

75 Recognising that an employed person, such as AB, who has transferred his residence to Switzerland and is employed by an employer established in Germany, has the right to rely on the provisions of the AFMP against the latter State enables him to benefit fully from the right of residence provided for in those provisions, while maintaining his economic activity in his country of origin (see, by analogy, judgment of 28 February 2013, *Ettwein*, C-425/11, EU:C:2013:121, paragraph 39). The free movement of persons guaranteed by the AFMP would be impeded if a national of a Contracting Party were to be placed at a disadvantage in his or her State of origin solely for having exercised his or her right of free movement (judgment of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 53 and the case-law cited).

76 Consequently, AB's situation falls within the scope of the AFMP and of Annex I thereto. Moreover, the principle of equal treatment, laid down in Article 9 of that Annex I, applies in the situation of an employed person, such as AB, who has exercised his freedom of movement vis-à-vis the host Member State of that employed person, which is also that employed person's State of origin.

77 Last, that interpretation is not called into question by the judgment of 12 November 2009, *Grimme* (C-351/08, EU:C:2009:697), in which the Court held that the principle of non-discrimination did not apply to the situation of a national of a Member State employed in the territory of the same Member State in a branch of a company governed by Swiss law. It is apparent from the facts of the case that gave rise to that judgment that the only connecting factor with Switzerland was the fact that the branch in which the person concerned was employed in Germany was a branch of a company governed by Swiss law.

78 Since AB's situation falls within the scope of the AFMP and the principle of equal treatment, laid down in Article 9 of Annex I thereto, applies to such a situation, it must be ascertained whether the AFMP, interpreted in accordance with the principles and the considerations set out in paragraphs 47 to 50 of the present judgment, precludes AB from being denied the right to opt for a voluntary assessment procedure in Germany.

The scope of the terms of the AFMP

The difference in treatment with regard to a tax concession

79 It is apparent from the request for a preliminary ruling that the right to opt for voluntary assessment, the enjoyment of which is sought by AB in the dispute in the main proceedings, is conferred on taxpayers who have their place of residence or habitual abode in Germany and on taxpayers not resident in Germany if they are nationals of a Member State or of a State party to the EEA Agreement and reside in the territory of one of those States.

80 It is apparent from the explanations provided by the referring court that the right to opt for voluntary assessment makes it possible, inter alia, to claim the deduction of occupational expenses incurred in obtaining income from employment and to offset the wage tax that has been withheld in the withholding tax procedure, which may lead to an income tax refund.

81 Consequently, as the Advocate General observes in point 71 of his Opinion, the right to opt for voluntary assessment constitutes a tax concession within the meaning of Article 9(2) of Annex I to the AFMP.

82 The legislation at issue in the main proceedings therefore establishes, as regards the possibility of obtaining a tax concession such as the right to opt for voluntary assessment, a difference in treatment on the basis of the residence of the employed person, since a German national, such as AB, is unable to claim that right of option on account of his status as an employed person residing in Switzerland.

83 According to case-law prior to the date of signature of the AFMP, recently recalled by the Court in its judgment of 24 February 2015, *Sopora* (C-512/13, EU:C:2015:108, paragraph 23), the principle of equal treatment prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, such as the criterion of residence, lead in fact to the same result (see, to that effect, judgments of 12 February 1974, *Sotgiu*, 152/73, EU:C:1974:13, paragraph 11; of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraphs 26 and 28; and of 12 September 1996, *Commission* v *Belgium*, C-278/94, EU:C:1996:321, paragraph 27 and the case-law cited). Since equal treatment is a concept of EU law, that case-law is also valid with regard to the application of that agreement, in accordance with Article 16(2) thereof (see, to that effect, judgment of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643, paragraph 26).

84 Legislation that provides for a distinction based on the criterion of residence is therefore liable to lead to the same result as discrimination by reason of nationality prohibited by Article 9(2) of Annex I to the AFMP.

85 It must, however, be noted that the effect of Article 21(2) of the AFMP is that taxpayers whose situations are not comparable, especially as regards their place of residence, may be treated differently for tax purposes (judgments of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 45, and of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 58).

86 In relation to direct taxes, the situations of residents and of non-residents in a given State are not generally comparable, since there are objective differences between them both from the point of view of the source of the income and from that of their personal ability to pay tax or the

possibility of taking into account their personal and family circumstances (judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 31 et seq., and of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, paragraph 41).

87 However, in the case of a tax concession which is not available to a non-resident, a difference in treatment as between the two categories of taxpayer may constitute 'discrimination' where there is no objective difference between the situations of the two such as to justify different treatment in that regard (see, to that effect, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraphs 36 to 38, and of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, paragraph 42).

Whether the situations are comparable

88 In that regard, the German Government submits that, with regard to the right to opt for the voluntary assessment scheme, employed persons residing in Switzerland are not in a situation comparable to that of employed persons residing in Germany, in the light, in particular, of the objectives of the German income tax regime, which makes it possible to check, in the event of receipt of income from employment, the wage tax withheld and to determine the correct amount of income tax.

89 According to that government, first, resident and non-resident employed persons could have their occupational expenses which exceed the employee lump sum allowance taken into account by recording the allowance. While, for non-resident employed persons, the deadline for submitting such an application is 31 December of the calendar year in which the allowance applies, in the case of resident employed persons, that date is 30 November of that calendar year.

90 The German Government adds that it is therefore necessary to give resident employed persons the right to opt for voluntary assessment so that they could have their potentially higher or unforeseeable occupational expenses, incurred in December of the tax year and in respect of which it would not be possible to record the allowance, deducted from their income from employment that is taxable in Germany. There is no such need for employed persons who reside in Switzerland and are partially taxable in Germany, in view of the longer period available to them for requesting that the allowance be recorded.

91 Second, the German Government submits that resident and non-resident employed persons are not in a comparable situation with regard to the tax advantages associated with taking their personal and family circumstances into account and AB also does not belong to the category of persons who are treated as being fully liable to German income tax at their request, since the major part of the worldwide income of that category of persons is taxable in Germany.

92 Third, referring to the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 47), that government submits that the application of different taxation procedures to taxpayers depending on whether they are partially or fully liable to tax reflects the difference between the situations in which those taxpayers find themselves with regard to recovery of the tax.

93 It should be noted in that regard that, as the Advocate General observes in point 79 of his Opinion, the German legislation provides that persons resident in other Member States of the European Union or in a State party to the EEA Agreement who are partially liable to German income tax

are eligible to request a voluntary assessment of their income from employment with a view to obtaining a deduction of their occupational expenses after tax has been withheld at source on payment of their wages.

94 In so doing, the German legislation treats resident taxpayers in the same way as certain non-resident taxpayers in that regard and thus accepts that their situations are comparable for the purpose of taxing their wages received in Germany. Consequently, it cannot be asserted that a taxpayer's non-resident status in itself makes his or her situation objectively different from that of a resident taxpayer. The German Government has not put forward any arguments to show that the residence of a taxpayer specifically in Switzerland makes his or her situation objectively different from that of a taxpayer resident in Germany.

95 Moreover, the arguments put forward by that government seeking to challenge the comparability of the situations of those taxpayers must be rejected.

96 As regards, in the first place, the argument that only resident taxpayers would be faced with the disadvantages arising from a shorter time limit for recording the allowance, it must be stated that it is not apparent from the documents before the Court that the voluntary assessment procedure is complementary to the procedure for recording the allowance. On the contrary, it is apparent from the explanations given by the referring court that the voluntary assessment procedure is an alternative procedure that is less restrictive than the procedure for recording the allowance in order to be able to have occupational expenses taken into account.

97 The referring court stated that filing the tax return is equivalent to exercising the right of option and that the taxpayer could decide, within the four-year assessment period, whether or not to file an income tax return, which the taxpayer would do only if the wage tax paid was higher than the income tax calculated. On the other hand, recording the allowance would oblige the taxpayer to make a decision based on prediction regarding the amount of foreseeable taxable income and deductible occupational expenses and would be associated with uncertainty as to whether the allowance would be too high and whether the taxpayer would have to make any additional payments. Furthermore, recording the allowance would expose the taxpayer to an obligation to file a return, on pain of criminal penalties and coercive measures, within a much shorter period than the limitation period applicable with regard to assessment.

98 Consequently, a difference in situations with regard to the possibility of benefiting from voluntary assessment cannot, subject to verification by the referring court, be inferred from the different time limits for recording the allowance applicable to residents and non-residents.

99 In the second place, it is true that, as is apparent from the case-law referred to in paragraphs 86 and 87 of the present judgment, with regard to the tax advantages associated with taking their personal and family circumstances into account, residents and non-residents are not generally in comparable situations. However, it should be noted that the right to voluntary assessment allows occupational expenses to be taken into account.

100 In that regard, it is sufficient to note that the taking into account of such expenses does not stem from the taxpayer's personal situation, but from the fact that those expenses are incurred in order to earn income from employment and, as is apparent from Paragraph 50(1) of the EStG, the German legislation provides for occupational expenses to be taken into account for non-resident taxpayers, in so far as those expenses have an economic link with German income. Consequently,

the German legislation itself treats resident and non-resident taxpayers in the same way as regards the taking into account of occupational expenses that have an economic link with German income.

101 In the third place, as regards the German Government's argument relating to the difference between the situations of resident and non-resident taxpayers with regard to the recovery of the tax, it should be noted that the disadvantageous tax treatment does not arise from a difference concerning the collection technique, since, as is apparent from the documents before the Court, the wage tax is in both cases withheld at source, without the voluntary assessment procedure having the effect of calling that withholding into question. Furthermore, as the referring court states, the right to voluntary assessment would not lead to a tax debt that must be recovered or to subsequent difficulties for the Federal Republic of Germany. Nor would it require any particular administrative assistance for the purpose of establishing the facts and recovering the tax.

102 Consequently, Article 21(2) of the AFMP cannot be relied on in order to deny an employed person the tax concession consisting in the right to opt for voluntary assessment on the sole ground that his or her place of residence is in Switzerland and not in Germany.

The existence of a justification

103 It must therefore be examined whether, as the German Government asserts, such a difference in treatment may be justified under Article 21(3) of the AFMP or by the overriding reason in the general interest relating to the need to preserve fiscal coherence.

104 First, Article 21(3) of the AFMP provides, inter alia, that that agreement is not to prevent the Contracting Parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under their national tax legislation. The Court has held that such measures, which correspond, according to the Court's case-law in the context of free movement of persons within the European Union, to overriding reasons in the general interest, must, in any event, have due regard for the principle of proportionality, that is, they must be appropriate for attaining those objectives and must not go beyond what is necessary in order to attain them (judgment of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 63).

105 Denying the benefit of voluntary assessment does not appear to be a measure capable of ensuring the imposition, payment and effective recovery of taxes or of forestalling tax evasion. In that regard, as observed in paragraph 101 of the present judgment, it is apparent from the explanations provided by the referring court that the right to voluntary assessment does not lead to a tax debt that must be recovered and to subsequent difficulties for the Federal Republic of Germany in the collection procedure, nor does it require any particular administrative assistance for the purpose of establishing the facts and recovering the tax.

106 As the Advocate General states in point 89 of his Opinion, the withholding of tax at source on wages paid in Germany to persons resident in Switzerland ensures that income tax on those earnings is properly collected by the German authorities.

107 Second, the German Government submits that the difference in treatment at issue is justified by the need to preserve fiscal coherence. According to that government, the possibility for employed persons who are fully liable to German income tax of benefiting from the voluntary assessment scheme and the possibility available to those persons, until 30 November of the relevant calendar year, of requesting that the allowance be recorded, are symmetrical.

108 In that regard, the Court has accepted that the overriding reason in the general interest connected with the need to safeguard fiscal cohesion may be relied on in order to justify a difference in treatment that is prohibited, in principle, by Article 9(2) of Annex I to the AFMP (see, to that effect, judgment of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraphs 50, 52 and 54). In order for an argument based on such a justification to succeed, the existence of a direct link must also be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, by analogy, judgments of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, paragraph 58, and of 16 July 1998, *ICI*, C-264/96, EU:C:1998:370, paragraph 29).

109 As noted in paragraph 96 of the present judgment, there is no such direct link in a situation such as that at issue in the main proceedings.

The standstill clause

110 Last, the German Government submits that the refusal to allow employed persons who reside in Switzerland and work in Germany to benefit from the voluntary assessment scheme is not contrary to the AFMP on account of the standstill clause in Article 13 of the AFMP, which should be interpreted in a similar way to Article 64 TFEU. According to that government, that clause confers a right to maintain existing restrictions in force, the reference date in that regard being the date on which the AFMP entered into force, namely 1 June 2002, not the date on which it was signed. Such an interpretation, which, that government submits, follows from the very classification as a standstill clause, is the only one that ensures the useful effect of such a clause.

111 It should be noted that, in accordance with the wording of Article 13 of the AFMP, the Contracting Parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals in fields covered by that agreement. By contrast, that Article 13 does not contain any indication as to any right of the States party to the AFMP to maintain existing restrictions.

112 It must be stated that Article 13 of the AFMP is, in that regard, substantially different from Article 64 TFEU, which expressly provides that the provisions of Article 63 TFEU are to be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or EU law adopted in respect of certain movements of capital to or from third countries.

113 The right to maintain measures capable of constituting exceptions to the principle of equal treatment laid down in Article 9 of Annex I to the AFMP cannot, moreover, be inferred from the context of Article 13 of the AFMP or from the objectives pursued by that agreement.

114 Article 13 of the AFMP forms part of Title II of the AFMP, relating to the general and final provisions, which also includes Article 10 of the AFMP, providing for the right of the Swiss Confederation and certain Member States to maintain, for a certain period, quantitative limits in respect of access to an economic activity for certain categories of residence and controls on the priority of workers integrated into the regular labour market and wage and working conditions

applicable to nationals of the other Contracting Party, and the right of the Swiss Confederation to reserve, within its overall quotas, minimum amounts of new residence permits for employed and self-employed persons of the European Union.

115 In view of the fundamental nature of the principle of equal treatment, the Contracting Parties' ability to maintain measures that may constitute exceptions to that principle should have been the subject of an express provision of the AFMP, like the restrictions on free movement referred to in Article 10 of the AFMP.

116 Moreover, to interpret the AFMP in such a way as to allow the restrictions existing on the date on which it was signed or it entered into force to be maintained throughout its duration would be contrary to the objectives pursued by that agreement, as recalled in paragraphs 50 and 53 of the present judgment, seeking to secure, for natural persons who are nationals of the Member States of the European Union and the Swiss Confederation, the free movement of persons in the territory of those Contracting Parties and to accord those nationals, inter alia, a right of entry, residence, access to work as employed persons and the same living, employment and working conditions as those accorded to nationals.

117 Consequently, Article 13 of the AFMP cannot be interpreted as allowing the denial of the benefit, to employed persons who reside in Switzerland and work in Germany, of the right to opt for the voluntary assessment scheme to be maintained.

118 In the light of all the foregoing considerations, the answer to the question referred is that Articles 7 and 15 of the AFMP, read in conjunction with Article 9(2) of Annex I to the AFMP, must be interpreted as precluding legislation of a Member State that reserves to taxpayers who are nationals of that Member State, of another Member State or of a State party to the EEA Agreement and who reside in the territory of one of those States the right to opt for a voluntary assessment procedure in respect of income from employment in order to have expenses such as occupational expenses taken into account and to have the wage tax that has been withheld in the withholding tax procedure offset, which may lead to an income tax refund, and that does not confer such a right of option on, inter alia, a national of the first Member State who resides in Switzerland and who receives income from employment in that Member State.

Costs

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

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

Articles 7 and 15 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, as last adapted by the Protocol of 4 March 2016 regarding the participation of the Republic of Croatia as a Contracting Party, following its accession to the European Union, read in conjunction with Article 9(2) of Annex I to that agreement,

must be interpreted as precluding legislation of a Member State that reserves to taxpayers who are nationals of that Member State, of another Member State or of a State party to the Agreement on the European Economic Area of 2 May 1992 and who reside in the territory of one of those States the right to opt for a voluntary assessment procedure in respect of income from employment in order to have expenses such as occupational expenses taken into account and to have the wage tax that has been withheld in the withholding tax procedure offset, which may lead to an income tax refund, and that does not confer such a right of option on, inter alia, a national of the first Member State who resides in Switzerland and who receives income from employment in that Member State.

[Signatures]