OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 26 May 2011 [1]

I — Introduction

1. In the present case, the Court has been asked by the Finanzgericht (Finance Court) Baden-Württemberg (Germany) whether Article 45 TFEU must be interpreted as precluding a national provision under which certain supplementary income received inter alia by employed persons who are employed by a German legal person governed by public law may be exempted from tax on the basis of an activity carried out outside Germany ('residence allowances').

2. This question is raised because a French national employed by a French legal person governed by public law does not benefit from such exemption in respect of the residence allowances she receives on the basis of her activity in Germany.

1 — Original language: French.

II — Legislative framework

A — *Treaty law*

3. Article 14(1) of the Convention between the Federal Republic of Germany and the French Republic for the avoidance of double taxation [2] ('the Bilateral Tax Convention') lays down the 'paying State principle', under which salaries, wages and similar remuneration which are paid by a legal person governed by public law of a Contracting State to natural persons residing in the other State in respect of present service in the administration are taxable only in the first-named State.

4. Article 20 of the Bilateral Tax Convention lays down provisions for the avoidance of double taxation of residents of the Federal Republic of Germany and residents of the French Republic.

2 — Convention between the Federal Republic of Germany and the French Republic for the avoidance of double taxation and on mutual administrative and judicial assistance in the area of taxes on income and capital, trade taxes and real property taxes, as amended by the Additional Agreement of 9 June 1969, the Additional Agreement of 28 September 1989 and the Additional Agreement of 20 December 2001.

5. Article 20 provides:

'(1) In the case of persons residing in the Federal Republic [of Germany], double taxation shall be avoided as follows:

a. ... income originating in France... which is taxable in France under this Convention shall be exempt from the German tax base. This provision shall not restrict the right of the Federal Republic [of Germany] to take into account, when determining its tax rate, the income and assets so exempted.

...

(2) Double taxation of persons resident in France shall be avoided in the following manner:

a. Profits and other positive income originating in the Federal Republic [of Germany] and taxable there under the provisions of this Convention shall also be taxable in France where they accrue to a person resident in France. The German tax shall not be deductible for the calculation of the taxable income in France. However, the recipient shall be entitled to a tax credit to be set against the French tax charged on the taxable amount which includes that income. That tax credit shall be equal:

...

cc. for all other income, to the amount of the French tax on the relevant income. This provision shall also apply in particular to the income referred to in Articles... 14.

...'

B — *National legislation*

6. Paragraph 1(1) and (2) of the German Federal Law on income tax (Einkommensteuergesetz, 'the EStG') is worded as follows:

'(1) Natural persons who are domiciled or habitually resident in Germany shall be subject to unlimited income tax liability.

(2) German nationals who

1. have neither their domicile nor their habitual residence in Germany and who

2. are linked by a contract of employment to a German legal person governed by public law and who therefore receive a salary from a public body in Germany

shall also be subject to unlimited income tax liability.'

7. Paragraph 3(64) of the EStG provides:

'The earnings of employees who are employed by a German legal person governed by public law and who, on that basis, receive a salary paid by a public body in Germany shall be exempt from tax where those earnings are for an activity abroad and exceed the remuneration to which the employee would be entitled for an equivalent activity at the location of the public body of payment....'

8. Paragraph 32b(1) of the EStG provides:

'Where a person, who is temporarily or during the whole period of assessment subject to unlimited tax liability

...

3. has received income which, provided it is included when the income tax is calculated..., is exempt from tax under an agreement for the avoidance of double taxation or any other international agreement, a special tax rate shall be applied to the taxable income under Paragraph 32a(1).'

9. Paragraph 32b(2) adds:

'The special tax rate under subparagraph (1) is the tax rate which arises where, on calculating the income tax, the taxable income under Paragraph 32a(1) is increased or reduced by

...

2. in the cases referred to in subparagraph (1), points 2 and 3, the income designated there, with one fifth of the extraordinary income included therein being taken into account.'

III — The main proceedings and the questions referred for a preliminary ruling

10. Ms Schulz-Delzers and Mr Schulz ('the applicants') are resident in Germany. They are subject to unlimited income tax liability within the meaning of Paragraph 1(1) of the EStG.

11. As a married couple, the applicants are jointly assessed for income tax. In order to mitigate the progressive application of the income tax scale [3] for married, not permanently separated taxpayers subject to unlimited taxation who have different incomes, the German legislature has introduced joint assessment arrangements, involving the setting of a joint tax base combined with 'splitting'. Under Paragraph 26b of the EStG, the income earned by the couple is aggregated and attributed to them jointly. The couple are thus treated as one taxpayer and income is charged to tax as if each spouse had each earned one half thereof.

12. Mr Schulz is a German national and is employed as an in-house lawyer, receiving a salary of EUR 75 400 in 2005 and EUR 77 133 in 2006.

13. Ms Schulz-Delzers, a French national, is a civil servant employed by the French State. In that capacity, she is a teacher in a German-French primary school in Germany. In 2005 and 2006, she was employed on fixed-term contracts in Germany. She received income from the French State amounting to, respectively, EUR 29 279 and EUR 30 390.

14. In addition to the civil servant's usual salary, her income includes residence allowances. There are two allowances, namely an 'ISVL' allowance (specific allowance linked to local living conditions), a monthly sum of around EUR 440 in compensation for a loss of purchasing power, and a 'family supplement' allowance, which is paid in respect of dependent children of French civil servants and is a monthly supplement of slightly more than EUR 130 linked to additional costs for dependent children.

15. The tax treatment of Ms Schulz-Delzers' income was based on Articles 14 and 20(1)(a) of the Bilateral Tax Convention.

16. In France, Ms Schulz-Delzers' usual salary but not the residence allowances were taxed in the two years at issue. The amounts of those allowances are, respectively, EUR 6 859.32 (in 2005) and EUR 6 965.88 (in 2006).

17. In Germany, the Finanzamt (Tax Office) Stuttgart III ('the Finanzamt') exempted those residence allowances from tax, but – as with the rest of the salary – applied to them the progressiveness condition, after deducting the lump-sum professional expenses

3 — Income tax rates are fixed in Germany according to a progressive scale, higher income being subject to the application of a higher tax rate. That scale reflects an assessment by the German legislature of the taxpayer's ability to pay tax.

allowance of EUR 920.[4] As a result of the inclusion of those allowances, the applicants' income tax was increased by EUR 654 in 2005 and EUR 664 in 2006.

18. The objections raised against that tax treatment were rejected by the Finanzamt on 30 April 2009.

19. The applicants then brought an action on 18 May 2009. They contest the inclusion of those residence allowances in the progressiveness condition. They claim that Paragraph 3(64) of the EStG should be applied so as to rule out any discrimination vis-à-vis national taxpayers who benefit from that provision.

20. The application of such a provision requires the worker to be employed by a German legal person governed by public law and, on that basis, his income to be paid by a German public body for an activity carried out outside Germany. In the present case, Ms Schulz-Delzers is employed by a French legal person governed by public law and, on that basis, receives her income from a French public body for an activity carried out in Germany.

21. The Finanzgericht Baden-Württemberg has doubts as to the compatibility of Paragraph 3(64) of the EStG with European Union law.

22. In those circumstances, the Finanzgericht Baden-Württemberg decided to stay the proceedings and, by order of 21 December 2009, requested the Court to answer the following questions:

'1. (a) Is Paragraph 3(64) of the [EStG] compatible with the freedom of movement of workers pursuant to Article [39 EC, now Article 45 TFEU]?

(b) Does Paragraph 3(64) of the [EStG] constitute covert discrimination on grounds of nationality prohibited by Article [12 EC, now Article 18 TFEU]?

2. If the reply to the first question is in the negative: is Paragraph 3(64) of the [EStG] compatible with the freedom of movement of Union citizens under Article [18 EC, now Article 21 TFEU]?'

4 — By virtue of a progressiveness condition, the German legislature takes into account certain income which is exempt in determining the tax rate applicable to other income. In the view of the German legislature, a taxpayer who receives exempt income subject to a progressiveness condition has a greater ability to pay tax than a taxpayer who does not receive such income. The progressiveness condition is thus applicable, inter alia, to certain replacement income which is in principle exempt, such as unemployment benefit, which is not intended to compensate for certain costs, but to guarantee generally sufficient means of subsistence – see paragraph II.2.a) of the grounds of the judgment of the Bundesfinanzhof (Federal Finance Court) of 9 August 2001 (III R 50/00, *Bundessteuerblatt* 2001 II, p. 778).

IV — The procedure before the Court

23. The applicants, the German and Spanish Governments, and the European Commission submitted written observations. They also presented oral argument at the hearing which was held on 24 March 2011.

24. The parties expressed their views on the compatibility of Paragraph 3(64) of the EStG with Article 45 TFEU. The applicants and the Commission, unlike the German and Spanish Governments, consider that the national provision is not compatible with the freedom of movement of workers.

V — Analysis

25. The referring court subdivides its first question into two parts, the first relating to the compatibility of the national provision with Article 45 TFEU, [5] and the second with Article 18 TFEU.

5 — Since the facts underlying the main proceedings took place before 1 December 2009, that is prior to the entry into force of the Treaty of Lisbon, the interpretation requested by the referring court actually relates to Articles 12 EC, 18 EC and 39 EC. As the Commission pointed out in its written observations that fact, however, has no bearing on the relevant criteria in the present case, as the wording of those articles was not amended with the entry into force of the FEU Treaty. Because the reference was made by the referring court after the entry into force of the Treaty of Lisbon, the relevant Treaty provisions will be referred to in their version in force after 1 December 2009.

26. Furthermore, the referring court takes the view that if the reply to the first question is in the negative, the Court must examine the compatibility of the provision with Article 21 TFEU.

27. In order to answer the questions asked by the referring court, it is first necessary to clarify the relevant provisions which are applicable in the main proceedings (A). It must then be determined, principally, whether Ms Schulz-Delzers suffers discrimination on grounds of nationality or whether she suffers a restriction on her freedom of movement (B). As the arguments made below will show, I consider that not to be the case, in particular, having regard to discrimination, in the absence of the comparability of the situations at issue. In case the Court does not share that point of view, I will compare, in the alternative, the situations at issue in the main proceedings (C).

A — *The applicable relevant provisions*

28. The answer to the questions asked by the referring court first requires a clarification of the provisions of European Union law which are applicable in the main proceedings.

29. In this case, in order to determine the relevant provisions of European Union law, it is first necessary to ascertain that the situation

at issue in the main proceedings actually falls within the scope of application of the rules on freedom of movement (1) and to establish, if necessary, the particular freedom of movement which covers such a situation (2). Lastly, it must be examined whether the Bilateral Tax Convention is relevant to the resolution of the dispute (3).

1. The application of the rules on freedom of movement

30. The German Government points out that, in any event, Ms Schulz-Delzers manifestly accepted the teaching post in a Franco-German school in Germany only because her family residence was located there. She did not settle in Germany in order to take up that job.

31. In French law, the contested allowances are thus residence allowances, connected with the fact that Ms Schulz-Delzers did not need to leave her country of residence to carry out her activity. Teachers who are recruited in France to carry out an activity outside France receive different allowances, known as expatriation allowances.

32. In a judgment of 26 January 1993,[6] the Court addressed the situation of a German national who had obtained his degrees and professional qualifications in Germany, who had always practised his profession in Germany, but who had lived with his wife in the Netherlands since 1961. The Court refused to grant him the benefit of freedom of establishment and acknowledged that he was more heavily taxed than German nationals residing in Germany, as his residence in the Netherlands was 'the only factor which takes his case out of a purely national context'.[7]

33. Ms Schulz-Delzers, a French national, carries out an activity in Germany for the French State, which pays her income, including the residence allowances. In the circumstances in the main proceedings, there are several factors which take her case out of a purely national context.

34. Furthermore, in the case which led to the judgment in *Werner*, the Advocate General had stated that 'so long as he has not made use of the freedoms provided for in Articles 48, 52 and 59 of the [EEC] Treaty, [Mr Werner] cannot invoke in his country of origin, where he is established, rights recognised by Community law',[8] explaining that 'the plaintiff has exercised his freedom of movement...

6 — Case C-112/91 *Werner* [1993] ECR I-429.
7 — Ibid., paragraph 16.
8 — Point 44 of the Opinion of Advocate General Darmon in that case.

without any connection with any economic activity'.[9] Free movement of persons could thus be connected only with the exercise of an economic activity.

35. Free movement of persons is now no longer connected with the status as a worker in the host Member State,[10] since a national of another Member State may rely on a right of free movement and of residence as a citizen, without any connection with employment or self-employment.[11] Furthermore, he may benefit from a right of free movement and of residence as a citizen after having exercised such a right as a worker, and vice-versa.[12] Consequently, it appears justified that he may rely on freedom of movement for workers even if he previously benefited from the rules on freedom of movement only as a citizen.

36. Moreover, in its definition of obstacle, the Court has reaffirmed on several occasions that 'the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'.[13] Such a statement does not connect the movement of a national of a Member State with the pursuit of an activity in another Member State. That movement could therefore have taken place prior to the pursuit of the activity.

37. In the main proceedings, Ms Schulz-Delzers has not always resided in Germany. She was previously domiciled in France and therefore moved in order to establish her residence in Germany. As a result, she has exercised her right to free movement. Her situation certainly falls within the scope of the freedoms of movement under European Union law.

2. The exclusive application of freedom of movement for workers

38. In its written observations, the Commission takes the view that Article 18 TFEU is not applicable because Paragraph 3(64) of the EStG concerns the specific situation of employed persons. Similarly, in the view of the German Government, it is

9 — Ibid., point 45.

10 — Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

11 — Article 7(1) of Directive 2004/38.

12 — Article 14 of Directive 2004/38.

13 — See, for example, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94; Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 52; and Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraph 34.

not possible to make an assessment on the basis of the general principle of non-discrimination because that provision has to be assessed only in the alternative, where no other fundamental freedom is applicable.

39. Article 18 TFEU applies independently only to situations governed by European Union law in respect of which the Treaty lays down no specific prohibition of discrimination. However, Article 45 TFEU establishes such a specific prohibition. [14]

40. Similarly, Article 21 TFEU, which lays down generally the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom of movement for workers. Therefore, if the case in the main proceedings falls under Article 45 TFEU, it will not be necessary for the Court to rule on the interpretation of Article 21 TFEU. [15]

41. None of the parties contests Ms Schulz-Delzers' status as a worker within the meaning of Article 45 TFEU.

42. The referring court and the Commission rightly draw attention to the strict interpretation which must be given to the derogation under Article 45(4) TFEU, which is not applicable to posts which, whilst nominally public positions, do not involve any association with tasks belonging to the public service. [16]

43. Consequently, it is not necessary to examine the national legislation having regard to Articles 18 TFEU and 21 TFEU. It is necessary to give an interpretation only of Article 45 TFEU with regard to the national legislation in question.

44. The applicants consider that Article 45 TFEU must be interpreted as precluding Paragraph 3(64) of the EStG. Before examining that point, it is necessary to explain the reasons why the provisions of the Bilateral Tax Convention are not relevant in the main proceedings.

14 — See, for example, Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraphs 24 and 25, and Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraphs 98 to 100.

15 — See, with regard to freedom of establishment and freedom of movement for workers, Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 13, and Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 15; see, by analogy, in the context of freedom to provide services, Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18, and Case C-56/09 *Zanotti* [2010] ECR I-4517, paragraph 24.

16 — See Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 11, and Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285, paragraph 2; with regard to the strict interpretation of that derogation, see, inter alia, Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 69; with regard to the refusal to include university teaching activities, being activities of civil society, see Case C-281/06 *Jundt* [2007] ECR I-12231, paragraphs 37 and 38.

3. The irrelevance of the provisions of the Bilateral Tax Convention

45. The tax treatment of Ms Schulz-Delzers' income in France and in Germany was in accordance with Articles 14 and 20 of the Bilateral Tax Convention. However, the contracting parties to a bilateral tax convention are free to determine the connecting factors for the allocation of fiscal jurisdiction, since such freedom has been recognised by the Court. [17]

46. In the main proceedings, the applicants do not complain that the Finanzamt applied Article 20 of the Bilateral Tax Convention, which gives it the option to take into account, when determining the tax rate for a person coming under that convention, income exempt from the German tax base.

47. On the other hand, the applicants object to the inclusion of the residence allowances, because such allowances are not included, under the German legislation, where they are paid to German nationals residing outside the Federal Republic of Germany. It is not therefore necessary in this case to assess the provision of a bilateral tax convention.

48. Only the national legislation is at issue in this case, specifically Paragraph 3(64) of the EStG, under which residence allowances paid to an employed person who is employed abroad by a German legal person governed by public law are not subject to the progressiveness condition. That paragraph is relevant, because although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with European Union law. [18]

49. More specifically, it must be ascertained whether Article 45 TFEU must be interpreted as precluding the application, in the German legal system, of Paragraph 3(64) of the EStG to a worker who is employed abroad by a German legal person governed by public law, whereas, in that same legal system, the same treatment provided for is denied in the case of a worker employed in Germany by a legal person governed by public law of another Member State. It must therefore be examined whether the application of that paragraph entails discrimination against Ms Schulz-Delzers and whether, if the reply is in the negative, it constitutes a restriction on her freedom of movement.

17 — Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 48 and case-law cited.

18 — See, for a recent application, Case C-440/08 *Gielen* [2010] ECR I-2323, paragraph 36.

B — *First, the absence of discrimination on grounds of nationality and the absence of a restriction on freedom of movement*

50. First, I will examine whether Ms Schulz-Delzers suffers discrimination on grounds of nationality (1) and I will establish the absence of a restriction on her freedom of movement (2).

1. The absence of discrimination on grounds of nationality

51. It must be noted that the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [19]

52. According to the referring court, Paragraph 3(64) of the EStG constitutes covert discrimination on grounds of nationality because, as a rule, German nationals are employed by a German legal person governed by public law. Therefore it is primarily German nationals who receive the benefit of the advantage inherent in Paragraph 3(64) of the EStG. [20]

53. However, in order to classify a national measure as discriminatory on grounds of nationality, it is first necessary to determine the situations covered. Discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. [21]

54. In the main proceedings, Ms Schulz-Delzers' income, which includes residence allowances, is paid to her exclusively by the French State. Consequently, it is not taxed in Germany. Nevertheless, having opted to be jointly assessed for income tax with her husband, which is possible by virtue of their joint residence in Germany, her income is included by the German legislature, in accordance with the progressiveness condition, in order to determine the tax rate applicable to her husband and to her. Ms Schulz-Delzers

19 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; for a recent application, see *Gielen*, paragraph 37, with reference to Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 26.

20 — As the German Government rightly states, Paragraph 3(64) of the EStG also applies to employed persons who are posted abroad for a limited period for a German private employer and who have a domicile for that purpose: '[i]n the case of other workers who are posted abroad for a limited period, who are domiciled or habitually resident there, the purchasing-power adjustment granted to them by a national employer is exempt from tax provided that it does not exceed the amount allowed for comparable foreign service remuneration pursuant to Paragraph 54 of the Federal Law on remuneration of civil servants (Bundesbesoldungsgesetz)'; however, this clarification is not relevant for the purposes of my analysis, which relates to a comparison of the situations of workers carrying on their activity for a public employer.

21 — *Gielen*, paragraph 38 and case-law cited.

considers that she suffers discrimination by virtue of such inclusion in her income of the residence allowances, in contrast to the residence allowances paid by the German State.

55. In order to give the referring court an answer with regard to the basis of the argument put forward by the applicants in the main proceedings, it is necessary to examine the arguments which they put forward before the Court and those advanced by the Commission in their support in the present preliminary ruling proceedings. On the basis of those arguments, the applicants and the Commission plead that, having regard to the Court's case-law, Ms Schulz-Delzers is in a situation comparable to that of a German national who receives residence allowances on the basis of the pursuit, outside the Federal Republic of Germany, of an activity for the German State.

(a) Consideration of the applicants' arguments

56. The applicants consider that there is no objective difference between those situations, which are therefore comparable, simply basing their position on *Schumacker*. [22]

57. That case concerned the application in Germany of tax legislation which provides for different taxation of non-resident and resident employed persons who have the same State of employment, the Federal Republic of Germany. Non-resident employed persons are subject to tax only on the part of their income arising in Germany (limited tax liability). On the other hand, resident employed persons are taxed on all their income (unlimited tax liability). For the latter, tax is determined, inter alia, taking into account their personal and family circumstances. Account is taken of family expenses, welfare expenses and other outgoings which in general give rise to tax reliefs and rebates. Such tax reliefs and rebates are excluded for non-residents.

58. The applicant in that case, Mr Schumacker, objected that that tax system was applied to him. He had his habitual residence in Belgium, but he obtained the major part of his taxable income from an activity performed in Germany and was not taxable in Belgium. [23] The Court held, in the light of the specific characteristics of that situation, that it was comparable to that of a person residing in Germany and that, consequently, Mr Schumacker should be given the same tax treatment as a resident of that State. Otherwise, his personal and family circumstances would not have been taken into

22 — See paragraph 24.

23 — See point 66 of the Opinion of Advocate General Léger in that case.

account either in the State of residence or in the State of employment. [24]

59. Non-residents must, however, be treated in the same way as residents only where the worker exercising freedom of movement obtains the major part of his income in the State of employment and is not taxable in his State of residence. That presupposes that account must be taken of the specific characteristics of the field of taxation. One of those characteristics is that each Member State of the European Union may grant the taxable person tax reliefs and rebates, in accordance with its own tradition and policy choices, on the basis of his personal and family circumstances. Consequently, it does not have to grant non-resident workers exercising their right to free movement the reliefs and rebates which it grants to residents, where those workers continue to be taxable in their State of residence. Otherwise, it would not guarantee them equal treatment with residents, but a privilege, namely the privilege of obtaining those advantages twice, once in the State of residence and once in the State in which they exercise freedom of movement.

60. In the main proceedings, Ms Schulz-Delzers wishes to benefit, as a person residing in Germany, from the same tax advantage as that granted to non-residents in Germany. She receives her allowances from the French Republic, unlike those non-residents who receive their allowances from the Federal Republic of Germany. Accordingly, Ms Schulz-Delzers' situation is not comparable to the situation identified in *Schumacker*, as she is not seeking, as a non-resident, to be treated in the same way as a resident. Ms Schulz-Delzers cannot therefore claim the same treatment which the Court considered should be accorded to Mr Schumacker. Whilst the principle of non-discrimination, as applied in *Schumacker*, seeks to ensure that non-residents employed in a Member State benefit from national treatment, that is to say, the treatment accorded to residents employed in that Member State, Ms Schulz-Delzers cannot, on that basis, claim the benefit of the treatment granted by the State in which she is resident to its own non-resident nationals.

61. Furthermore, a German non-resident benefiting from the application of Paragraph 3(64) of the EStG receives his residence allowances from the Federal Republic of Germany, whilst Ms Schulz-Delzers receives hers from the French Republic. Unlike the situation in *Schumacker*, the Member States in which the resident and the non-resident are employed are therefore different.

24 — *Schumacker*, paragraph 38.

(b) Consideration of the Commission's arguments

62. In support of its view that Ms Schulz-Delzers has suffered discriminatory treatment, the Commission, for its part, first mentions a line of case-law where the Court held discrimination to exist where, in recruiting or remunerating civil servants, a Member State takes into account periods of employment completed in its national civil service and not those completed in the civil service of another Member State or, at the very least, it does not take them fully into account. [25] Second, the Commission relies on *Jundt*. [26]

63. As far as the first point of the Commission's arguments is concerned, the Commission fails to demonstrate its relevance to the situation in the main proceedings. It simply claims in very general terms that such a line of case-law reflects a similar situation of discrimination on grounds of nationality.

64. As regards the second point, which relates to *Jundt*, the Commission makes reference to that judgment because in that case the Court regarded it as a restriction on the freedom to provide services that a lawyer residing in Germany was taxed more heavily, in respect of teaching activities carried out in France in addition to his main activity of lawyer, which was carried out in Germany, than a lawyer residing in Germany carrying out a secondary teaching activity in Germany alongside his main activity as a lawyer.

65. In that case, two residents in Germany were treated differently in respect of teaching activities carried out in two different Member States. The more favourable tax treatment accorded by the State of taxation to a taxpayer who received income from teaching activities carried out in that State was linked to the organisation of that country's education system. The Court thus gave the ruling mentioned by the Commission, stating that 'the competence and the responsibility of the Member States for the organisation of their respective education systems cannot have the effect of removing tax legislation such as that at issue in the main proceedings from the scope of the Treaty provisions on the freedom to provide services.' [27]

66. *Jundt*, which is relied upon by the Commission, does not therefore constitute a relevant precedent in resolving the question whether the situation of Ms Schulz-Delzers, a person residing in Germany, is comparable

25 — Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 11; Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, paragraph 23, in conjunction with paragraph 14; Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095, paragraphs 20 and 21; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraphs 41 to 44; and Case C-278/03 *Commission* v *Italy* [2005] ECR I-3747, paragraph 14.

26 — Cited above.

27 — Ibid., paragraph 87.

to that of German non-residents benefiting from Paragraph 3(64) of the EStG.

67. In the present case, in the context of the exercise by the Federal Republic of Germany of its fiscal jurisdiction, Ms Schulz-Delzers is subject to the same treatment as all residents in Germany. Furthermore, because she is jointly assessed for income tax with her husband who also resides in Germany, her personal and family circumstances are taken into account, even though she does not receive any taxable income in Germany.

68. In conclusion, it cannot be inferred from the case-law, cited in order to resolve the question which the Court has been asked, that Ms Schulz-Delzers' situation and the situation of a German national benefiting from Paragraph 3(64) of the EStG are comparable.

69. The premiss for the application of the principle of non-discrimination, as laid down in Article 45 TFEU, is therefore absent.

70. In addition, as will be explained below, I consider that the legislation in question does not constitute an obstacle to the freedom of movement for workers prohibited by Article 45 TFEU.

2. The absence of a restriction on the freedom of movement for workers

71. Article 45 TFEU prohibits not only all discrimination, direct or indirect, based on nationality but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement. [28]

72. It is settled case-law of the Court that all the Treaty provisions relating to the free movement of persons are intended to facilitate the pursuit by European nationals of occupational activities of all kinds throughout the Union. [29]

73. According to the Court's case-law, 'provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement' constitute an obstacle. [30]

74. In its written observations, the Commission states that Paragraph 3(64) of the EStG specifically promotes the activity of German civil servants abroad. Whilst

28 — See, for example, Case C-190/98 *Graf* [2000] ECR I-493, paragraph 18, and *Weigel*, paragraph 51.

29 — *Alevizos*, paragraph 74 and case-law cited.

30 — See, inter alia, *Bosman*, paragraph 96, and Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 78.

the German legislature encourages the free movement of its nationals, it has not been shown that it impedes the free movement of nationals of other Member States.

75. In order to characterise an obstacle to freedom of movement for workers, it must be determined whether a national of a Member State receives less favourable treatment than he would enjoy if he had not availed himself of freedom of movement. [31]

76. The obstacle is thus assessed in the light of the situation of the national of a Member State in his State of origin and in his host State.

77. In the present case, the applicants state in their observations that indirect taxation of the allowances runs counter to the objective of such income, which is to allow officials to be posted to Germany without as a result having to suffer a loss of earnings, which represents an obstacle to their posting to Germany. They add that the obstacle also resides in the fact that Ms Schulz-Delzers suffers less favourable treatment than she would have enjoyed if she had been posted to another European country in which there was no rule corresponding to the combined provisions of the progressiveness clause and Paragraph 3(64) of the EStG.

78. In exercising her freedom of movement, Ms Schulz-Delzers did not suffer a loss of earnings, because the residence allowances from which she was able to benefit, subject to the progressiveness condition, would not have been paid to her in France.

79. In addition, the inclusion of that income under the progressiveness condition was made possible only because Ms Schulz-Delzers is assessed jointly for income tax with her husband. The joint assessment was the applicants' choice, resulting in the setting of a joint tariff which is more favourable than two separate tariffs.

80. If the couple had been assessed separately, Ms Schulz-Delzers would not have been subject to the progressiveness condition, since her only income, which she receives from the French State, is not taxable in Germany in accordance with Articles 14 and 20(1)(a) of the Bilateral Tax Convention.

81. Consequently, Ms Schulz-Delzers has not shown that the exercise of her right of free movement has resulted in unfavourable

31 — See, inter alia, *Alevizos*, paragraph 75, and Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 64 and case-law cited.

consequences compared with the situation of French workers who have not exercised their right of free movement.

82. It is not for the Court to rule on a hypothetical situation in which Ms Schulz-Delzers exercised her right of free movement in another Member State.

83. I therefore propose that the Court answer the questions asked by the referring court to the effect that Article 45 TFEU must be interpreted as not precluding the legislation of a Member State, such as Paragraph 3(64) of the EStG, under which certain supplementary income received by workers employed by a national legal person governed by public law, on the basis of an activity carried out outside the territory of that Member State, is exempt from tax, whereas the advantage conferred by such a national provision does not apply to supplementary income received by workers employed by a legal person governed by public law of another Member State, on the basis of an activity carried out in the first Member State.

84. In case the Court does not concur with my proposal, I will compare, in the alternative, Ms Schulz-Delzers' situation and the situation of a German national who benefits from Paragraph 3(64) of the EStG.

C — *In the alternative, comparison between Ms Schulz-Delzers' situation and the situation of a German national who benefits from Paragraph 3(64) of the EStG*

85. For the purposes of this analysis, it is necessary to rule on the comparability of the residence allowances at issue (1), to examine the tax treatment of Ms Schulz-Delzers in Germany (2) and to study the situation of a German national who benefits from Paragraph 3(64) of the EStG in France (3).

1. Consideration of the residence allowances

86. The Court should examine more specifically the residence allowances received by Ms Schulz-Delzers and by a German national who benefits from Paragraph 3(64) of the EStG. Only if those residence allowances prove to be comparable could the discrimination claimed by the applicants in the main proceedings be specifically established.

87. In the view of the applicants, the residence allowances are comparable. The referring court also implicitly shares this position. In the view of the Commission, as it reiterated at the hearing, it is for the referring court to examine this point.

88. Without going into the detail of the residence allowances granted by each of the Member States, it is nevertheless necessary, in order to ascertain whether Article 45 TFEU precludes Paragraph 3(64) of the EStG, for the Court to rule on the actual principle of the comparability of the allowances, the common factor of which is that they are granted, on the basis of an activity carried out outside the awarding Member State, in the Member State in which their recipient is resident.

89. Ms Schulz-Delzers resides in one Member State, the Federal Republic of Germany, which is different from the State of residence of a German national who benefits from Paragraph 3(64) of the EStG. However, that element cannot be disregarded where the residence allowances are examined.

90. The residence allowances received by Ms Schulz-Delzers comprise an 'ISVL' allowance, linked to local living conditions, and a 'family supplement' allowance, which is paid in respect of dependent children of French civil servants. According to the applicants, such allowances are supplements which compensate for a loss of purchasing power and supplementary costs relating to children abroad.

91. In France, the amount of these allowances is fixed regularly by joint decree of the Minister for Foreign Affairs and the Minister responsible for the budget *for each foreign country*. [32] In its written observations, the German Government states that, in order to fix the amount of such allowances, the German Ministry of Finance regularly publishes country lists, together with the Ministry of Foreign Affairs. The amount of such allowances is therefore determined with reference to the State in which the recipient of those allowances is resident.

92. In reality, residence allowances, both in France and in Germany, are intended to establish a balance between two requirements, namely, on the one hand, the inclusion of the supplementary expenses incurred as a result of carrying out an activity outside the State which pays and taxes the income linked to that activity and, on the other, the wish to place the recipient of such allowances in the same situation as all the other residents of the State in which he carries out his activity.

32 — For 2005 and 2006, see Decree No 2002-22 of 4 January 2002 relating to the administrative and financial situation of the staff of French educational establishments abroad (JORF of 6 January 2001, p. 387), as amended by Decree No 2003-481 of 3 June 2003 (JORF of 6 June 2003, p. 9636), Article 4(B)(d) of which provides for the payment of 'a specific allowance linked to local living conditions, the annual amount of which is fixed for each country and for each group by joint decree of the Minister for Foreign Affairs and the Minister responsible for the budget ...'; Article 4(B)(e) of that decree refers to the provisions concerning family supplements granted to expatriate staff, which similarly provide that 'a joint decree of the Minister for Foreign Affairs and the Minister responsible for the budget shall fix, for each foreign country and taking into account the different situations in which staff may be placed in France or abroad, the coefficient applicable for each dependent child'.

93. Thus, the recognition of supplementary expenses incurred justifies the grant of residence allowances, even if the cost of living in the State in which the activity is carried out is lower than in the State paying the income. However, variations in those residence allowances depending on the host State can be explained only by some degree of consideration of the local cost of living.

94. With regard to the first allowance, which is specifically linked to local living conditions, Article 4(B)(d) of the French Decree provides for the annual adjustment of the amount of that allowance 'in order to take into account, inter alia, variations in exchange rates and local living conditions'. For its part, the German Government states that, in the case of benefits in France of a German teacher, the compensation for loss of purchasing power is evaluated taking into account the higher cost of living in France than in Germany. At the hearing, it added that a German civil servant posted to a country where living standards are lower does not receive such an allowance.

95. As regards the second allowance, linked to dependent children, it does not disregard the methods and costs of schooling children in the State of residence. The French rules in force in 2005 and in 2006 thus provided for the calculation of those 'family supplements' with reference to the State of residence. [33] In addition, the calculation of that allowance has evolved and the current French rules, by virtue of the Decree of 31 January 2011, [34] now fix 'the family allowance... for the staff of French educational establishments abroad' with reference, inter alia, to the region of residence: 'Germany (Berlin)', 'Germany (Bonn)', 'Germany (Düsseldorf)', 'Germany (Frankfurt)', and so forth.

96. It cannot therefore be claimed that the amount of the residence allowances is determined without regard to the State of residence in which the activity in question is carried out.

97. The amount of the residence allowances is fixed by each Member State in exercise of its fiscal jurisdiction. Such allowances supplement the other income paid by the State of employment for the activity carried out, which inevitably differs from one Member State to the next.

98. It is true that the cost of living may vary within a single national territory and that, in

33 — Decree of 4 January 2002 fixing for each country the coefficients used for the calculation of the family supplements and the family allowance paid abroad for dependent children of expatriate or resident staff of French educational establishments abroad (JORF of 6 January 2002, p. 402, text No 13).

34 — Decree of 31 January 2011 amending the Decree of 5 February 2008 issued pursuant to Decree No 2002-22 of 4 January 2002 relating to the administrative and financial situation of the staff of French educational establishments abroad (JORF of 15 February 2011, p. 2833, text No 3).

the present case, Ms Schulz-Delzers' cost of living could ultimately prove to be higher in Stuttgart in Germany than it was in Beauvais in France. However, it is not for the Court to rule on the methods used by the national legislature to calculate the residence allowances in exercise of its fiscal jurisdiction.

99. The residence allowances are intended to establish equal treatment among the residents of a given State – the State where the employed person carries out his activity – even if a resident receives his income from another Member State. It is therefore in keeping with that principle for him to be subject to the same tax treatment as all residents. That is the case with regard to Ms Schulz-Delzers in the main proceedings.

2. The tax treatment of Ms Schulz-Delzers in Germany

100. Ms Schulz-Delzers benefits from the same tax treatment as other German residents, which is not contested by the applicants. With regard to her tax situation in Germany alone, Ms Schulz-Delzers is even in a more favourable position than a German female civil servant who works outside Germany, but is assessed for tax with her husband in Germany, as the German Government showed at the hearing by means of an arithmetical example. [35]

101. In a previous case, the Court ruled on the situation of a Franco-German national who taught in a State school in Germany and resided in France with her husband. [36] Applying the provisions of the Bilateral Tax Convention, this time in France, that resident in France was taxed more heavily than persons receiving exactly the same income, but only from a French source, which she contested before the French court. A question for a preliminary ruling on the matter having been referred to it, the Court stated that the objective of the Bilateral Tax Convention 'is simply to prevent the same income from being taxed in each of the two States. It is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other'. [37] The Court added that individual income from employment received in Germany by that French resident '[was] none the less

35 — The German Government assumed scenario A of a German couple with the wife working abroad: the husband has a taxable income of EUR 40 000 and the wife has a taxable income of EUR 20 000, plus EUR 7 000 in residence allowances which are exempt from tax; the total taxable income is EUR 60 000: by applying a rate of 19.36 %, the tax due is EUR 11 614. Scenario B is that of a couple in a similar situation to the applicants: the husband has a taxable income of EUR 40 000 and the wife has a taxable income of EUR 27 000 which is exempt from tax, but subject to the progressiveness clause; the total taxable income is EUR 40 000: by applying a rate of 20.7 % (calculated on the basis of an income of EUR 67 000), the tax due is EUR 8 300.

36 — Case C-336/96 *Gilly* [1998] ECR I-2793.

37 — Ibid., paragraph 46.

aggregated within the basis for assessing the personal income tax payable by her tax household in France, where she is therefore entitled to the tax advantages, rebates and deductions provided for in the French legislation.' [38]

102. Ms Schulz-Delzers, as a person liable to pay tax to the French State residing in Germany, contests the taking into account of her residence allowances in Germany. However, she is also entitled to the tax advantages, rebates and deductions provided for in the German legislation in the context of the joint assessment with her husband, which would not be the case for a German couple who were in a similar situation to the applicants in another Member State.

103. Only by taking into account the tax due in France would it be possible to evaluate whether Ms Schulz-Delzers is actually in a less favourable situation than the German national with whom she is compared. In that case, it would also be necessary to take into account the tax treatment of that same national in the State in which he carries out his activity. It would therefore be necessary to examine the application of the following legislation:

— the tax legislation of Ms Schulz-Delzers' State of employment;

— the tax legislation of her State of residence, which is also the State of employment of the German national; and

— the tax legislation of the State of residence of that German national.

104. Consequently, the disparity in treatment suffered by Ms Schulz-Delzers compared with a German national placed in a similar situation stems only from the application of different tax legislation.

105. The Court has held, with regard to Article 12 EC, that 'it is settled case-law that Article 12 EC is not concerned with any disparities in treatment … which may result from divergences existing between the various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality.' [39] Such an assertion can be applied to Article 45 TFEU in the present case. If the residence allowances received by a German national are not taken into account, it is because the legislation of his State of residence diverges on that point.

38 — Ibid., paragraph 50.

39 — Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 34.

106. If the Court were to compare the situation of a French national residing in Germany, the State in which he carries out his activity, with the situation of a German national residing and carrying out his activity in France, it would find that in the main proceedings the applicants do not suffer any tax disadvantage.

3. The situation of a German national who benefits from Paragraph 3(64) of the EStG in France

107. As the applicants state, the residence allowances received by Ms Schulz-Delzers are exempt from tax in France. They are also exempt, in the opposite case, where a civil servant is posted outside the Federal Republic of Germany. Such a rule has no basis in the Bilateral Tax Convention, but stems from an international practice, as was stated by the applicants in their observations and during the hearing.

108. The applicants complain that the Federal Republic of Germany has made the residence allowances received by Ms Schulz-Delzers on the basis of her activity in Germany subject to the progressiveness clause, but it should be noted that the German national who is in a similar situation in France is subject to the same constraint.

109. In reality, even though, under the Bilateral Tax Convention, the Federal Republic of Germany may take into account, in determining its tax rate, income excluded from the German tax base, no such choice may be made in the case of German nationals who reside in France.

110. The Bilateral Tax Convention is drafted differently in respect of the tax treatment in France of income originating from the Federal Republic of Germany. The mechanism under Article 20(2)(a)(cc) of that convention involves first aggregating the income earned from work in Germany within the tax base calculated in accordance with the French legislation and then giving a tax credit in respect of the tax paid in Germany, equal, in particular for the income referred to in Article 14 of the convention, to that of the French tax on the relevant income. [40]

111. Consequently, the income of a German national in a similar situation to that of Ms Schulz-Delzers in France forms part of the tax base calculated in accordance with the French legislation. It is therefore taken into account in determining income tax, even if the recipient is subsequently entitled to a tax credit.

40 — For a more detailed description, see *Gilly*, paragraph 42.

112. It follows that the applicants cannot claim to have suffered less favourable tax treatment than a German national who benefits from the exemption under Paragraph 3(64) of the EStG and who carries out his activity in France.

113. Furthermore, the wording of the Bilateral Tax Convention is taken from a model convention produced by the Organisation for Economic Cooperation and Development (OECD). [41] More specifically, Article 23 A(1) to (3) thereof is worded as follows:

'1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

2. Where a resident of a Contracting State derives items of income which... may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other State.

3. Where in accordance with any provision of the Convention, income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.'

114. The Bilateral Tax Convention, which the Federal Republic of Germany applies strictly, taking into account all Ms Schulz-Delzers' income, thus follows the OECD model convention exactly.

115. Consequently, Ms Schulz-Delzers' situation is likely to occur in all the Member States which, like the Federal Republic of Germany and the French Republic, have concluded bilateral tax conventions based on that same model.

116. I therefore consider that the legislation in question does not place Ms Schulz-Delzers in a less favourable situation than a German national in a similar situation.

41 — OECD Model Tax Convention on Income and on Capital, text of the articles as at 29 April 2000.

VI — Conclusion

117. In the light of all these considerations, I suggest that the Court answer the questions asked by the Finanzgericht Baden-Württemberg as follows:

'Article 45 TFEU must be interpreted as not precluding the legislation of a Member State, such as Paragraph 3(64) of the German Federal Law on income tax (Einkommensteuergesetz), under which certain supplementary income received by workers employed by a national legal person governed by public law, on the basis of an activity carried out outside the territory of that Member State, is exempt from tax, whereas the advantage conferred by such a national provision does not apply to supplementary income received by workers employed by a legal person governed by public law of another Member State, on the basis of an activity carried out in the first Member State.'