



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 July 2017¹

Case C-355/16

Christian Picart

v

Ministre des Finances et des Comptes publics

(Request for a preliminary ruling from the Conseil d'État (Council of State) (France))

(Reference for a preliminary ruling — 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 — Right of establishment — Self-employed person — Articles 12 and 15 of Annex I to the agreement — Fiscal legislation — Taxation of unrealised gains on securities — Transfer of tax residence from the Member State concerned)

I. Introduction

1. The present request for a preliminary ruling, submitted by the Conseil d'État (Council of State) (France), 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 1999² ('the AFMP'), which entered into force on 1 June 2002.
2. The request was submitted in the context of a dispute between Mr Christian Picart, a French national, and the French tax authorities concerning the tax authorities' decision to re-assess the amount of the unrealised gain on the shares which he held and had declared when he transferred his tax residence from France to Switzerland and to make him liable for additional assessments to income tax and social security contributions, with penalties.
3. The present case provides the Court with the opportunity to clarify, in essence, whether, in keeping with its rulings concerning the FEU Treaty provisions on freedom of establishment, the scope of the terms of the AFMP on the right of establishment and the principle of non-discrimination extends to a fiscal measure, consisting in taxing unrealised gains 'on leaving' the national territory, adopted by the State of origin of a national of a Member State when he transfers his tax residence to Switzerland.

¹ Original language: French.

² OJ 2002 L 114, p. 6.

II. Legal context

A. *The AFMP*

4. In the words of the preamble to the AFMP, the contracting parties are ‘resolved to bring about the free movement of persons between [the territories of the Contracting Parties] on the basis of the rules applying in the European Community’.

5. Article 1(a) of the AFMP states that the objective of that agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is 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.

6. Article 2 of the Agreement, entitled ‘Non-discrimination’, 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, II and III to that agreement, to be the subject of any discrimination on grounds of nationality.

7. Article 4 of the AFMP, entitled ‘Right of residence and access to an economic activity’, states that the right of residence and access to an economic activity is to be guaranteed in accordance with the provisions of Annex I.

8. Article 16 of the AFMP, entitled ‘Reference to Community law’, provides, in paragraph 2, that in so far as the application of the AFMP involves concepts of Community law, account is to be taken of the relevant case-law of the Court of Justice of the European Union prior to the date of its signature. Case-law after the date of signature of the AFMP is to be brought to Switzerland’s attention. To ensure that the agreement works properly, the Joint Committee is, at the request of either Contracting Party, to determine the implications of such case-law.

9. Annex I to the AFMP is devoted to free movement of persons. Article 9 of that annex, on ‘Equal treatment’, provides:

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

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

...’

10. Chapter III of Annex I to the AFMP contains the provisions on self-employed persons. Article 12(1) and (2) is worded as follows:

‘1. A national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (hereinafter referred to as a “self-employed person”) shall receive a residence permit valid for a period of at least five years from its date of issue, provided that he produces evidence to the competent national authorities that he is established or wishes to become so.

2. The residence permit shall be extended automatically for a period of at least five years, provided that the self-employed person produces evidence to the competent national authorities that he is pursuing a self-employed economic activity.'

11. Article 15(1) and (2) of Annex I to the AFMP, entitled 'Equal treatment', provides:

'1. As regards access to a self-employed activity and the pursuit thereof, a self-employed worker shall be afforded no less favourable treatment in the host country than that accorded to its own nationals.

2. The provisions of Article 9 of this Annex shall apply *mutatis mutandis* to the self-employed persons referred to in this Chapter.'

12. Article 21 of the AFMP, entitled 'Relationship to bilateral social security agreements', provides, in paragraph 3, that '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'.

13. Chapter V of Annex I to the AFMP is devoted to 'Persons not pursuing an economic activity'. Article 24 of Annex I, entitled 'Rules regarding residence', provides, in particular, in paragraph 1 that 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 the agreement is to 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 sufficient financial means not to have to apply for social assistance benefits during their stay and all-risks sickness insurance cover.

B. French tax law

14. In the words of Article 167 *bis* of the French General Tax Code ('the GTC'), in the version in force at the time of the facts of the main proceedings:

'I. — 1. Taxpayers normally resident for tax purposes in France for at least six of the 10 previous years shall be taxable, at the date of transfer of their residence from France, on the capital gains determined in company shares [representing a shareholding in excess of 25% of the capital of a company].

...

II. — 1. Payment of the tax on the increase in value determined may be deferred until the time of the transmission, redemption, repayment or cancellation of the company shares concerned.

Suspension of payment shall be subject to the condition that the taxpayer declares the amount of the increase in value determined in accordance with the conditions in [point] I above, applies for the benefit of suspension, designates a representative established in France authorised to receive communications concerning the basis of assessment, collection of the tax and any disputes relating thereto, and, before his departure abroad, provides guarantees to the official responsible for collection sufficient to ensure recovery of the debt by the Treasury.

...

2. Taxpayers benefiting from suspension of payment pursuant to this article shall be required to make the declaration referred to [in Article 170(1) of the GTC]. The total amount of the tax payment of which has been suspended shall be indicated on that declaration, which shall be accompanied by a statement set out on a form issued by the administration showing the amount of tax relating to the securities concerned for which the suspension of payment has not expired and also, where appropriate, the nature and date of the event entailing the expiry of the suspension.’

...

The tax paid locally by the taxpayer and relating to the increase in value actually realised outside France may be set off against the income tax established in France provided it is comparable with that tax.

...

4. Failure to produce the declaration and the statement referred to in [paragraph] 2 above, or the omission of all or part of the information that must be contained therein, shall result in the suspended tax becoming immediately payable.’

III. The facts of the dispute in the main proceedings, the questions referred and the procedure before the Court

15. Mr Picart transferred his tax residence from France to Switzerland on 7 June 2002. On that date he held significant shareholdings in a number of French companies.

16. On transferring his tax residence, Mr Picart, in accordance with Article 167 *bis* of the GTC, declared an unrealised capital gain on the shares and, in order to benefit from suspension of payment of the tax payable on that capital gain, appointed a tax representative in France and provided a bank guarantee to ensure recovery of the debt to the French Treasury.

17. In 2005, Mr Picart transferred his shares, thus bringing the suspension of taxation to an end. After examining Mr Picart’s personal tax situation for the period 1 January 2002 until 31 December 2004, the French tax authorities reassessed the amount of the capital gain at issue and claimed additional payments of income tax.

18. Mr Picart filed a complaint in order to obtain a discharge from that additional tax; his complaint was rejected by the tax authorities. Mr Picart then brought an action before the tribunal administratif de Montreuil (Administrative Court, Montreuil, France). In support of his claim, he maintained that Article 167 *bis* of the GTC was incompatible with the AFMP. In that regard, he claimed that freedom of establishment was guaranteed by that agreement and that he could rely on it, as a self-employed person, since he had become established in Switzerland in order to pursue there an economic activity consisting in managing his various direct or indirect shareholdings in a number of companies which he controlled. That claim was dismissed by judgment of 10 March 2011. His appeal against that judgment was dismissed by the cour administrative d’appel de Versailles (Administrative Court of Appeal, Versailles, France), whereupon Mr Picart appealed on a point of law to the Conseil d’État (Council of State, France).

19. The referring court wonders, in essence, (i) whether the right of establishment as a self-employed person, as defined in the terms of the AFMP, may be regarded as equivalent to the freedom of establishment guaranteed to nationals of the Member States by Article 49 TFEU and (ii) whether the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), delivered after the date of signature of that agreement, may be applicable to the agreement.

20. It was in those circumstances that the Conseil d'État (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) May the right of establishment as a self-employed person, as defined in Articles 1 and 4 of the [AFMP] and Article 12 of Annex I to that agreement, be regarded as equivalent to the freedom of establishment which Article 49 TFEU guarantees in respect of activities pursued as a self-employed person?
- (2) In this case, account being taken of the terms in Article 16 of the [AFMP], should the case-law deriving from the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), which was made after the agreement, be applied in the case of a national of a Member State who transferred his residence to Switzerland and who merely keeps his shareholding in companies under the law of that Member State (which gives him a definite influence over the decisions of those companies and enables him to determine their activities), without [proposing] to pursue in Switzerland an activity as a self-employed person which is different to the activity he pursued in the Member State of which he was a national and which consists in the management of his shareholdings?
- (3) If that right is not equivalent to the freedom of establishment, must it be interpreted in the same way as the Court of Justice of the European Union interpreted the freedom of establishment in the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525)?'

21. Those questions were the subject of written observations on the part of Mr Picart, the French Government and the European Commission. Those interested parties and the German Government presented oral argument at the hearing on 16 February 2017.

IV. Analysis

A. Preliminary considerations

22. Until 31 December 2004, Article 167 *bis* of the GTC established the principle that tax was immediately payable on capital gains on securities and company shares upon the transfer outside France of the residence of a taxpayer resident for tax purposes for at least six of the 10 years prior to that transfer. That taxation applied only to taxpayers whose shareholding exceeded 25% of the capital of a company during the five years preceding the date of the transfer of the tax residence. Provided he satisfied certain conditions, which included the obligation to provide a bank guarantee, a taxpayer, like Mr Picart in the main proceedings, could claim deferment of payment until such time, in particular, as the securities or company shares concerned were assigned.

23. That mechanism involving the immediate taxation of the unrealised capital gains determined at the date of transfer of the taxpayer's tax residence, together with a deferment of payment subject to strict conditions, was deemed to restrict the exercise of the freedom of establishment provided for in Article 52 of the EC Treaty (which, following amendment, became Article 43 EC, and then Article 49 TFEU) in the judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138).

24. More precisely, in paragraphs 46 and 47 of that judgment, the Court held that the application of Article 167 *bis* of the GTC meant that taxpayers wishing to transfer their residence outside French territory were treated disadvantageously by comparison with a person maintaining his residence in France, that being confirmed by an examination of the conditions of benefiting from suspension of payment, which included the obligation to provide a bank guarantee. After examining and rejecting in turn the legitimate objectives of general interest put forward by the Governments which had intervened in that case, which were apt to justify the interference with freedom of establishment, namely the prevention of tax avoidance, a guarantee of the coherence of the national tax system and

the allocation of tax powers between the Member States,³ the Court ruled that the principle of freedom of establishment laid down in Article 52 of the Treaty (which, following amendment, became Article 43 EC, and then Article 49 TFEU) precluded a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing as yet unrealised increases in value such as that laid down in Article 167 *bis* of the GTC, where a taxpayer transfers his tax residence outside that Member State.⁴

25. The solution defined by the Court with respect to the taxation of unrealised gains ‘on exit’ (known as the ‘exit tax’) provided for in Article 167 *bis* of the GTC, in the version applicable until 31 December 2004, was also applied in the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), which the referring court mentions, concerning the Netherlands ‘exit tax’ system, where the suspension of immediate payment of the tax on unrealised capital gains was also conditional on the provision of a bank guarantee by the taxpayer transferring his tax residence from one Member State to another.

26. Can the lessons learnt from those judgments, concerning the scope and the interpretation of freedom of establishment for nationals transferring their tax residence between two Member States, be applied by analogy to the interpretation of the terms of the AFMP between the Union and the Swiss Confederation?⁵

27. As is apparent from the grounds of the decision of referral, an affirmative answer to that question had already been formulated by Mr Picart before the French administrative courts in his actions against the initial taxation (described as ‘original’ taxation, according to the referring court), to which he had been subject in respect of the unrealised capital gains relating to the period concerned. However, that argument was rejected by the Conseil d’État (Council of State, France) in a judgment of 29 April 2013, essentially on the ground that Mr Picart had neither claimed nor, a fortiori, proved that he had transferred his tax residence to Switzerland in order to pursue an occupational activity there.⁶

28. It was therefore in the light of that judgment of the Conseil d’État (Council of State, France), and following the upward reassessment of the amount of the taxable capital gains by the French tax authorities in 2005, when he assigned his securities, that Mr Picart defended the theory that the management, from Switzerland, of his significant shareholdings in companies in France constitutes an activity ‘as a self-employed person’, within the meaning of the terms of the AFMP, which establish a right of establishment analogous to the freedom of establishment enshrined in Article 49 TFEU that precludes the application of a measure such as that laid down in Article 167 *bis* of the GTC (in the version applicable until 31 December 2004).

29. In its observations, the Commission essentially supports Mr Picart’s arguments. It considers that the right of establishment guaranteed to natural persons by the AFMP may be regarded as equivalent to the freedom of establishment enjoyed by persons exercising an activity as self-employed persons enshrined in Article 49 TFEU. That right, in the Commission’s view, precludes a mechanism such as that introduced by Article 167 *bis* of the GTC, particularly in the light of the Court’s case-law on the interpretation of freedom of establishment.

3 Judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraphs 50 to 68). It should be noted that the objective of preventing fiscal erosion of the tax base of the Member State concerned, put forward by the Danish Government, was not accepted as a matter of overriding general interest.

4 Judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 69 and operative part).

5 It is clear, as the referring court implicitly considers, that Article 43 EC (or now Article 49 TFEU) cannot apply directly and as such to relations between a Member State of the Union and a third State, including, in particular, the Swiss Confederation: see, to that effect, judgment of 15 July 2010, *Hengartner and Gasser* (C-70/09, EU:C:2010:430, paragraphs 25 and 26).

6 See Conseil d’État (Council of State), judgment of 29 April 2013, Mr Picart, No 357576. For one of a number of commentaries on that judgment, see: Le Mentec, F., ‘Exit tax (rég. anc.) et transfert du domicile fiscal en Suisse’, *Revue de droit fiscal*, No 27, 4 July 2013, comm. 361.

30. The French and German Governments take the opposite view. They claim, in essence, that the AFMP does not govern restrictions of a fiscal nature adopted by the State of origin of a national wishing to rely on the terms of that agreement. The German Government submits that, according to Article 21(3) of the AFMP, fiscal measures fall outside the scope of that agreement. Last, those two Governments maintain that Mr Picart is not exercising an activity that could be described as that of a 'self-employed' person. He cannot therefore rely on the right of establishment.

31. Although the referring court does not ask the Court about the interpretation of Article 21(3) of the AFMP, it is possible, if not probable, that if that provision were to be read in the way suggested by the German Government, there would be no need to answer the questions referred by that court. Article 167 *bis* of the GTC, as a measure designed to ensure the taxation, payment and actual recovery of taxes, or intended to avoid tax fraud, would thus fall outside the scope of the basic terms of the AFMP on the free movement of persons. It is therefore necessary first of all to analyse the scope of Article 21(3) of the AFMP. I shall then examine the scope of the right of establishment guaranteed by the AFMP.

B. The scope of Article 21(3) of the AFMP

32. Article 21 of the AFMP, which is among the 'General and final provisions' of that agreement, is broader in scope than suggested by its title, which refers only to the 'relationship [of the AFMP] to bilateral agreements on double taxation'. In fact, that article consists of three paragraphs, which refer to different situations and different measures which are not confined to the relationship of the AFMP to the bilateral double taxation agreements.

33. Admittedly, Article 21(1) of the AFMP does state that the provisions of such bilateral double taxation agreements between the Swiss Confederation and the Member States are to be unaffected by the provisions of that agreement.

34. However, paragraph 2 of that article lays down a general rule of interpretation, according to which no provision of the AFMP 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. That paragraph is therefore not confined to the relationship between the AFMP and the bilateral double taxation agreements.

35. More broadly still, Article 21(3) of the AFMP states that 'no provision of [the AFMP] 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 ...*'.⁷

36. In the light of its wording, therefore, does Article 21(3) of the AFMP mean that all fiscal measures adopted and applied by the Contracting Parties fall outside the scope of that agreement, as the German Government suggested at the hearing before the Court?

37. In my view it does not.

38. Article 21(3) of the AFMP, like the terms of any international agreement by which the Union is bound, must be interpreted, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969,⁸ in accordance with the ordinary meaning to be given to the terms of the agreement in their context and in the light of its object and purpose.⁹

⁷ Emphasis added

⁸ United Nations Treaty Series, vol. 1155, p. 331.

⁹ See, to that effect, in particular, judgments of 15 July 2010, *Hengartner and Gasser* (C-70/09, EU:C:2010:430, paragraph 36), and of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraph 94).

39. In that regard, the Court has held that it is clear from the preamble and from Articles 1(d) and 16(2) of the AFMP that that agreement is intended to achieve, in favour of EU nationals and those of the Swiss Confederation, the free movement of persons on the territory of the Contracting Parties to that agreement based on the rules applying in the European Union, the terms of which must be interpreted in accordance with the case-law of the Court.¹⁰

40. It also follows from both the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraphs 44 and 45), and the judgment of 19 November 2015, *Bukovansky* (C-241/14, EU:C:2015:766, paragraph 41), that neither of *the first two paragraphs* of Article 21 of the AFMP has been interpreted as excluding, as a matter of principles, the fiscal measures adopted by the Contracting Parties from the scope of the basic terms of that agreement, which, in accordance with the objective of the agreement, relate to freedom of movement for persons.¹¹

41. In particular, in the judgment of 19 November 2015, *Bukovansky* (C-241/14, EU:C:2015:766, paragraph 41), which concerned, in particular, the connection between Article 21(1) of the AFMP and Article 9(2) of Annex I to that agreement, which provides for equal treatment of employed persons as regards access to tax concessions and welfare benefits, the Court held that Article 21 of the AFMP could not have a scope that conflicted with the principles underlying the agreement of which it forms part. The Court inferred that that article ‘cannot therefore be understood as allowing the EU Member States and the Swiss Confederation to undermine the attainment of the free movement of persons by depriving, in the exercise of fiscal sovereignty as allocated by their bilateral agreements on double taxation, Article 9(2) of Annex I to the [AFMP] of its effectiveness’.

42. Article 21(1) and (2) of the AFMP therefore has a relative scope.

43. I therefore see no reason — nor have any reasons been explained by the German Government — why the position should be otherwise for Article 21(3) of the AFMP.

44. If Article 21(3) of the AFMP were interpreted as meaning that every fiscal measure falls outside the scope of that agreement, the inclusion in the AFMP of the two preceding paragraphs of that article would have been superfluous. More fundamentally, if such an interpretation of that provision were upheld, both Article 9(2) and Article 15(2) of Annex I to the AFMP, which provide, in particular and respectively, that employed persons and self-employed persons who have exercised their right of movement under the AFMP are to enjoy the same tax concessions in the host State as those enjoyed by national employed persons and self-employed persons, would also be deprived of their practical effect. In fact, the grant of a tax concession assumes that the income of the employed person or self-employed person concerned is subject to tax, even limited, on the territory of the Contracting Party in the context of the exercise of its power of taxation.¹²

45. Accordingly, contrary to the German Government’s assertion, Article 21(3) of the AFMP cannot be interpreted as exempting the Contracting Parties, even in tax matters, from complying with the basic terms of that agreement which, in accordance with the objective of that agreement, guarantee freedom of movement for persons between those Parties.

46. Article 21(3) of the AFMP must therefore be interpreted as meaning that it authorises the Contracting Parties to adopt and apply any measure to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion, *provided* that the fiscal competence thus retained is exercised in compliance with the objective of the AFMP and the terms of that agreement, which, in

¹⁰ See judgments of 19 November 2015, *Bukovansky* (C-241/14, EU:C:2015:766, paragraph 40), and of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705, paragraph 36).

¹¹ See also, concerning Article 21(2) of the AFMP, judgment of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705, paragraphs 45 and 48).

¹² See, to that effect, judgments of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraph 33); 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).

accordance with the objective of the agreement, relate to freedom of movement for persons. That interpretation of the scope of Article 21(3) of the AFMP is consistent with the case-law of the Court — developed before the date of signature of the AFMP, namely 21 June 1999 — according to which, although direct taxation is not, as EU law currently stands, a matter for the European Union, the Member States must nevertheless exercise their retained powers consistently with EU law.¹³

47. I would observe, moreover, that at the hearing before the Court the French Government itself acknowledged that Article 21(3) of the AFMP authorises the Contracting Parties only to adopt measures consistent with the principle of proportionality¹⁴ and with the objective pursued by the AFMP.

48. It follows that a measure such as Article 167 *bis* of the GTC does not fall outside the scope of the basic terms of the AFMP solely because it is a fiscal measure to ensure the payment and effective recovery of taxes or to forestall tax evasion.

C. The scope of the right of establishment guaranteed by the AFMP

49. According to the case-law, as the Swiss Confederation did not join the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot be automatically applied by analogy to the interpretation of the AFMP, *unless there are express provisions to that effect laid down by the agreement itself*.¹⁵

50. In the words of Article 1 of the AFMP, the objective of that agreement is, in particular, to accord to nationals of the Member States and of the Swiss Confederation ‘a right of ... establishment on a self-employed basis’ on the territory of the Contracting Parties.

51. Article 4 of the AFMP guarantees the right of residence and access to an economic activity in accordance with Annex I to that agreement.

52. According to Article 12(1) of Annex I to the AFMP, the concept of ‘self-employed person’ is to refer to the pursuit by a national of a Contracting Party wishing to become established in the territory of another Contracting Party of a self-employed activity. It is for that purpose that, in accordance with that article, a residence permit valid for a period of at least five years is to be issued to that person.

53. The right of establishment guaranteed by those provisions is therefore granted only to the nationals — natural persons — of a Contracting Party, for the purpose of pursuing a self-employed activity on the territory of *another* Contracting Party.¹⁶

¹³ See in particular, to that effect, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21); of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271, paragraph 16); and of 16 July 1998, *ICI* (C-264/96, EU:C:1998:370, paragraph 19).

¹⁴ A large part of the literature also seems to take that view: see, in particular, Hinny P., *Das Diskriminierungsverbot des Personenverkehrsabkommens im Schweizer Steuerrecht*, IFF Forum für Steuerrecht, 2004, p. 185; Cadosch, R.M., ‘Switzerland: Taxation of Employment Income — Compliance of Swiss Tax Law with EC-Swiss Sectoral Agreement on Free Movement of Persons’, *Intertax*, 2004, p. 599; Borghi, A., *La Libre Circulation des personnes entre la Suisse et l’UE, commentaire article par article de l’accord du 21 June 1999*, Edis, Geneva, 2010, p. 373; and Moshek V., ‘L’impact de the AFMP sur l’impôt à la source — Analyse à la lumière de l’judgment of Tribunal fédéral du 26 January 2010’, *Archiv für schweizerisches Abgaberecht*, 79, 2010-2011, p. 324.

¹⁵ See, to that effect, judgments of 12 November 2009, *Grimme* (C-351/08, EU:C:2009:697, paragraphs 27 and 29), and of 11 February 2010, *Fokus Invest* (C-541/08, EU:C:2010:74, paragraph 28).

¹⁶ See, to that effect, judgments of 12 November 2009, *Grimme* (C-351/08, EU:C:2009:697, paragraph 36), and of 11 February 2010, *Fokus Invest* (C-541/08, EU:C:2010:74, paragraph 31). The exclusion of legal persons from the scope of the right of establishment guaranteed by the AFMP was confirmed by the Court in paragraphs 37 and 39 of the judgment of 12 November 2009, *Grimme* (C-351/08, EU:C:2009:697).

54. It is common ground that, in the main proceedings, Mr Picart, a French national, intends not to carry out an activity as a self-employed person on the territory of the Swiss Confederation, but to continue an activity, the economic nature of which is, at least by implication, the subject of the referring court's second question, consisting in managing the significant shareholdings which he owns in the capital of companies established in France.

55. Mr Picart's situation therefore does not appear to fall within the scope of Article 12(1) of Annex I to the AFMP.

56. Admittedly, the Court has recognised, both in the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121), and in the judgment of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705), that the nationals of a Contracting Party could also rely on rights derived from the AFMP vis-à-vis their own country.

57. However, that assertion was made in different circumstances from those of the present case.

58. Thus, in the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121), the situation at issue was that of 'self-employed frontier workers', with respect to whom the Court made clear that that category of persons was governed by provisions which differed from the category of self-employed persons defined in Article 12(1) of Annex I to the AFMP.¹⁷ In particular, as the Court observed in paragraph 34 of the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121), it follows from Article 13(1) of Annex I to the AFMP that a self-employed frontier worker is 'a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity 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'.

59. It was specifically 'in accordance with [the] wording' of Article 13(1) of Annex I to the AFMP that the Court accepted, in the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraphs 34 and 35), that German nationals, having their residence on the territory of the Swiss Confederation and pursuing an activity as self-employed persons on the territory of the Federal Republic of Germany, could, on the basis of the distinction which that article draws between the place of residence of the persons concerned and the place where their activity as self-employed persons is pursued, rely on that provision in order to claim a tax concession from their Member State of origin. In fact, in Article 13(1) of Annex I to the AFMP, 'a distinction is drawn between the place of residence, situated in the territory of one contracting party, and the place where a self-employed activity is pursued, which must be in the territory of the other contracting party, *regardless of the nationality of the persons concerned*'.¹⁸

60. The wording of Article 12(1) of Annex I differs from the wording of Article 13(1) of that annex, as it requires that the activity as a self-employed person be pursued on the territory of the Contracting Party *other than* that of the Contracting Party of which the person *is a national* (and where that person will benefit from a residence permit valid for a period of at least five years). That condition is not satisfied in Mr Picart's case, as he maintains his activity on the territory of the Member State of which he is a national.

61. The circumstances of the judgment of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705), are also different from those of the present case, since Mr Radgen, a German national, had relied on his right to freedom of movement in order to pursue an activity as an employed person on the territory of the Swiss Confederation.

¹⁷ In the present case, there is nothing in the file to suggest that Mr Picart might be classified as a 'self-employed frontier worker' within the meaning of Article 13(1) of Annex I to the AFMP.

¹⁸ Judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraph 35). Emphasis added.

62. It is true that, as the referring court and Mr Picart have emphasised, as regards the interpretation of the freedom of establishment provided for in Article 43 EC (now Article 49 TFEU), the Court accepted, in paragraphs 27 and 28 of the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), that a Netherlands national who had a shareholding in the capital of a company governed by Netherlands law which gave him substantial influence over that company's decisions, came within the scope of such a freedom, since that national had transferred his residence to another Member State, in point of fact the United Kingdom. It is also true that the judgment gives no indication that, after transferring his residence to the United Kingdom, Mr N pursued an activity other than that of managing his significant shareholding in the capital of the companies governed by Netherlands law in question, which undeniably renders that situation comparable to Mr Picart's.

63. The judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525) shows that, in the context of the application of the TFEU, freedom of establishment may apply to a situation in which the natural person relying on that freedom manages majority shareholdings in the capital of a company situated not on the territory of the Member State to which that person has moved, but on the territory of his Member State of origin.

64. However, that case-law is based on two factors specific to the freedom of establishment guaranteed within the Union that are absent from the wording of the terms of the AFMP on the right of establishment.

65. *In the first place*, unlike the second paragraph of Article 43 EC and the second paragraph of Article 49 TFEU, Article 1(a) of the AFMP and Article 12(1) of Annex I to that agreement merely reserve the right of establishment to 'self-employed persons' and make no reference to the right to set up and manage undertakings, even exclusively limited to natural persons.

66. In that regard, it should be noted that paragraph 27 of the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), is expressly based on paragraph 22 of the judgment of 13 April 2000, *Baars* (C-251/98, EU:C:2000:205). In paragraph 22 of that judgment, the Court observed that the freedom of establishment guaranteed between Member States '*includes the right to set up and manage undertakings*, and in particular companies or firms, in a Member State by a national of another Member State. So, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment'.¹⁹

67. It is therefore the express inclusion of 'the right to set up and manage undertakings' in the scope of the second paragraph of Article 43 EC (and now the second paragraph of Article 49 TFEU), *alongside access to activities as a self-employed person*, that justifies the case-law resulting from the judgments of 13 April 2000, *Baars* (C-251/98, EU:C:2000:205), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525).

68. Consequently, it is apparent that the management of majority shareholdings by a national of a Member State in the capital of a company established within the Union falls within the freedom of establishment guaranteed by the second paragraph of Article 43 EC because that provision refers expressly, in particular, to 'the right ... to ... manage undertakings'.

¹⁹ Emphasis added.

69. As I have already said, it is apparent from Article 12(1) of Annex I to the AFMP that the concept of ‘self-employed person’ is being confused with the exercise of a self-employed activity. Furthermore, it does not follow from the context and the purpose of the AFMP that the Contracting Parties intended to confer on that concept a meaning other than its ordinary meaning, namely a self-employed economic activity,²⁰ that is to say, an activity pursued by a person outside a relationship of subordination with respect to the conditions of work or remuneration and under his own personal responsibility.²¹

70. Thus, while within the European Union freedom of establishment covers both access to self-employed activities and the right to set up and manage undertakings, which is why that freedom is described as ‘a very broad one’,²² the right of establishment provided for in Article 1(a) of the AFMP and Article 12(1) of Annex I to that agreement includes solely access to economic activities and the right to pursue such activities as a self-employed person, that is to say, self-employed activities.

71. Accordingly, I consider that, provided that Mr Picart, a French national, merely manages, from the territory of the Swiss Confederation, the shareholdings which he owns in the capital of companies established in France, that activity does not come within the concept of ‘self-employment’ within the meaning of 1(a) of the AFMP and Article 12(1) of Annex I to that agreement.

72. *In the second place*, contrary to Article 43 EC and then Article 49 TFEU, which prohibit ‘restrictions’ on the freedom of establishment of nationals of the Member States,²³ Article 15(1) of Annex I to the AFMP prohibits, with respect to self-employed persons, only discrimination on grounds of nationality.

73. Within the European Union, the prohibition of such ‘restrictions’ of freedom of establishment allowed the Court, especially in the judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 42), to assert that, in spite of the terms of the provisions relating to that freedom, which are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, those provisions also prohibit the Member States of origin from *hindering* the establishment in another Member State of one of its own nationals.²⁴

74. However, analogous reasoning finds no support in the terms of Article 15(1) of Annex I to the AFMP. That provision merely ensures that in the area of freedom of movement for self-employed persons the principle of non-discrimination defined in Article 2 of that agreement will be applied.²⁵ That principle means only that self-employed persons will be guaranteed the same treatment as nationals of the host country, which includes the prohibition of overt and covert forms of discrimination on grounds of nationality.²⁶

²⁰ See, in particular, judgments of 22 December 2008, *Stamm and Hauser* (C-13/08, EU:C:2008:774, paragraph 33), and of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraph 36).

²¹ See, by analogy, judgment of 20 November 2001, *Jany and Others* (C-268/99, EU:C:2001:616, paragraphs 34, 37 and 38). That judgment refers, in particular, to the judgment of 27 June 1996, *Asscher* (C-107/94, EU:C:1996:251, paragraphs 25 and 26).

²² See, in particular, judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 26 and the case-law cited).

²³ I recall that all measures which prohibit, impede or render less attractive the exercise of the freedom to provide services must be regarded as restrictions on that freedom (see, in particular, judgments of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 37), and of 6 September 2012, *Commission v Portugal* (C-38/10, EU:C:2012:521, paragraph 26 and the case-law cited)).

²⁴ See, for the earlier case-law, in particular, judgments of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456, paragraph 16), and of 16 July 1998, *ICI* (C-264/96, EU:C:1998:370, paragraph 21).

²⁵ See judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraphs 41 to 43).

²⁶ See, to that effect, judgment of 6 October 2011, *Graf and Engel* (C-506/10, EU:C:2011:643, paragraph 26).

75. The right of establishment of self-employed persons, provided for in the AFMP, is therefore more limited in scope than the prohibition referred to in Article 43 EC, now Article 49 TFEU. It follows that the Court's case-law relating to obstacles to the freedom of establishment of a national of a Member State imposed by his Member State of origin, although it predated the signature of the AFMP, on 21 June 1999, does not seem to me to be capable of being applied by analogy to the prohibition laid down in Article 15(1) of Annex I to the AFMP.

76. Therefore, in the light of the differences between Article 49 TFEU and the prohibition laid down in Article 15(1) of Annex I to the AFMP, read with Article 12(1) of that annex, that prohibition does not include the restrictions or obstacles imposed by a Contracting Party with respect to the right of establishment of one of its nationals.

77. Admittedly, I am not unaware, as I have already stated, that the Court has accepted, in the judgments of 15 December 2011, *Bergström* (C-257/10, EU:C:2011:839); of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121); of 19 November 2015, *Bukovansky* (C-241/14, EU:C:2015:766); and of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705), that the nationals of a Contracting Party who have exercised their right to freedom of movement can claim rights derived from the AFMP against their own country as well.

78. In the judgments of 15 December 2011, *Bergström* (C-257/10, EU:C:2011:839, paragraphs 27 to 34), and of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraph 33), the Court held that such rights can be claimed only 'in certain circumstances and in accordance with the provisions [of the AFMP] applicable'.

79. Although it referred to that case-law, the Court did not expressly reiterate that point in its 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). However, that does not mean that it has abandoned it.

80. However, I note that none of those four cases concerned a 'self-employed person' within the meaning of Article 12(1) of Annex I to the AFMP.

81. It is indeed possible to take the view that the *factual situation* giving rise to the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121), which, it will be recalled, concerned 'self-employed frontier workers', within the meaning of Article 13(1) of Annex I to the AFMP, is not so far removed from that of a self-employed person, on which Mr Picart seeks to rely. In fact, Mr and Mrs Ettwein were both nationals of one Member State (the Federal Republic of Germany) who pursued their self-employed activity in that Member State, but who had transferred their residence to Switzerland.

82. The Court accepted that those nationals could rely on Article 13(1) and Article 15(2) of Annex I to the AFMP as against the German authorities' refusal to grant them a tax concession on the sole ground that Mr and Mrs Ettwein had transferred their residence to Switzerland.

83. However, as I have already pointed out, the approach taken in the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121), is to my mind to be explained by the fact, which the Court also made clear in paragraphs 35 to 37 of that judgment, that, unlike Article 12(1) of Annex I to the AFMP, which defines 'self-employed persons' as nationals of a Contracting Party who pursue a self-employed activity on the territory of another Contracting Party, the distinction in Article 13(1) of that annex is drawn between the place of residence, situated on the territory of one Contracting Party, and the place where a self-employed activity is pursued, which must be on the territory of another *regardless of the nationality of the persons concerned*.

84. Therefore, although, in the case of self-employed frontier workers, the ‘host country’, within the meaning of Article 15(1) of Annex I to the AFMP, may perfectly well be the same as the country of origin of those frontier workers, as was the situation in the case that gave rise to the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121), conversely, as regards ‘self-employed persons’, within the meaning of Article 12(1) of that annex, the host country must be a Contracting Party whose nationality the self-employed person does not possess. Were that not so, the grant of a residence permit valid for a period of at least five years in order to pursue that activity, also provided for in Article 1 of Annex I to the AFMP, would be superfluous.

85. To summarise, I consider that the terms of the AFMP relating to the right of establishment of self-employed persons must be interpreted as meaning that they benefit only natural persons wishing to pursue, or pursuing, a self-employed activity on the territory of a Contracting Party other than that of which they are nationals, and on which they must be able to be treated in the same way as nationals of that State, that is to say, any overt and covert discrimination on grounds of nationality must be prohibited. On the basis of the information provided by the referring court, Mr Picart does not appear to fall within the scope of those terms.

86. In my view, those considerations make it possible to answer the three questions for a preliminary ruling submitted by the referring court.

87. I would add that, in the light of the context and the circumstances giving rise to the case in the main proceedings, the Court is not required to examine the question whether Mr Picart might, if necessary, rely on the terms of the AFMP relating to non-active persons.

88. Admittedly, Article 6 of the AFMP guarantees a right of residence on the territory of a Contracting Party for persons not pursuing an economic activity, in accordance with the provisions of Annex I relating to non-active people. Those persons, in accordance with Article 24(1) of Annex I to the AFMP, are to receive a residence permit valid for a period of at least five years, provided that they have sufficient financial means not to have to apply for social assistance benefits during their stay, and all-risks sickness insurance cover. In addition, compliance with the principle of non-discrimination on grounds of nationality, laid down in Article 2 of the AFMP, also applies to the non-active nationals of a Contracting Party who are lawfully resident on the territory of another Contracting Party.

89. However, apart from the fact that in my view those terms of the AFMP do not confer more rights than those relating to self-employed persons, the referring court does not ask the Court about those terms. In fact, as I explained in point 28 of this Opinion, the Conseil d’État (Council of State, France), in its judgment of 29 April 2013, answered in the negative the question whether Mr Picart could rely on the terms relating to non-active persons in the dispute between him and the French tax authorities. That judgment has acquired the force of *res judicata*. The principle of *res judicata* also assumes great importance in the EU legal order, in order to ensure both the stability of the law and legal relationships and the proper administration of justice. In that regard, the Court has already held that EU law does not require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a decision of a court, even if to do so would make it possible to remedy an infringement of EU law by the decision at issue, provided that the principles of equivalence and effectiveness are respected.²⁷

²⁷ See, in particular, judgments of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraphs 23 and 24), and of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraphs 39 and 40).

90. It is certainly a matter for regret that, as a court against whose decisions there is no judicial remedy under national law, the Conseil d'État (Council of State, France) did not previously make a reference to the Court, in the context of the case that eventually gave rise to the judgment of 29 April 2013, for a preliminary ruling on the interpretation of Articles 2 and 6 of the AFMP and on Article 24(1) of Annex I to that agreement, given, in particular, that the Court had not developed a body of case-law on the interaction of those terms.

91. That being so, it is quite clear that in the present case the referring court does not seek an interpretation of those terms, owing to the combined effect of the delivery of the judgment of the Conseil d'État (Council of State, France) of 29 April 2013, which has acquired the force of *res judicata*, and the delimitation of the dispute in the main proceedings, which is focused on the interpretation of the right of establishment, as conferred on self-employed persons by the AFMP.

92. In those circumstances, and also having regard to the fact that none of the interested parties in the present case has lodged observations on the interpretation of Article 6 of the AFMP and Article 24(1) of Annex I to that agreement, I consider that the Court should refrain from examining of its own motion the interpretation of those articles. To take the opposite approach, consisting in answering a question that was deliberately not asked, would amount to disregarding the limits of the subject matter of the dispute in the main proceedings, as defined by the referring court.²⁸

93. I therefore propose that the Court answer the questions submitted to it by the referring court as follows: the right of establishment of a self-employed person, as resulting from Articles 1 and 4 of the AFMP and also from Article 12(1) and Article 15(1) of Annex I to the AFMP, must be interpreted as meaning that it extends only to a natural person wishing to pursue, or pursuing, a self-employed activity on the territory of a Contracting Party other than that of which he is a national, and on which he must be treated in the same way as a national of that State, that is to say, any overt or covert discriminatory measure on grounds of nationality must be prohibited. On the basis of the information provided by the referring court, the plaintiff in the main proceedings does not appear to fall within the scope of those terms of the AFMP.

94. Should the Court not support the foregoing analysis and answer, and should it consider that the scope of the terms of the AFMP relating to the right of establishment of self-employed persons, like the provisions of Article 43 EC, now Article 49 TFEU, extended to any obstacle imposed by a Contracting Party to the establishment of its nationals on the territory of another Contracting Party on the basis, in particular, of reasoning influenced by that followed in the judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525), it would then in my view have to provide indications to the referring court relating to the proportionate nature of a measure involving the taxation of unrealised capital gains, such as that provided for in Article 167 *bis* of the GTC when a French taxpayer transfers his tax residence to Switzerland. I shall address that point, in the alternative, in the following discussion.

²⁸ This situation therefore in my view closely resembles the situation in which a referring court refuses, expressly or by implication, in the context of its request for a preliminary ruling, to refer an additional question on the interpretation of EU law. It is precisely in such a situation that the Court refrains from following its established practice of reformulating the questions referred to it in order to provide a helpful answer to the referring court: see, on that question, my Opinion of 1 April 2014 in the case of *Fonnship and Svenska Transportarbetareförbundet* (C-83/13, EU:C:2014:201, points 13 to 24 and the case-law cited).

D. In the alternative, the proportionate nature of a fiscal measure such as Article 167 bis of the GTC

95. As I have emphasised, Article 167 *bis* of the GTC, in the version in force at the time of the facts of the main proceedings, was based on the principle of immediate taxation of unrealised capital gains when a taxpayer left France. At the taxpayer's request, that tax could nonetheless be replaced by a payment suspended until the capital gains were realised, subject to certain conditions being met, including the obligation to declare the amount of the capital gain within a certain period and to provide suitable guarantees to ensure recovery of the tax.

96. It is common ground that, having satisfied the conditions when transferring his tax residence, Mr Picart benefited from the deferred recovery of the tax until his securities were assigned in 2005.

97. It is not clear from the case file that Mr Picart disputes the entire mechanism for the taxation of unrealised capital gains provided for in Article 167 *bis* of the GTC or merely disputes the conditions that must be satisfied in order to benefit from the deferred payment. As the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), to which the referring court makes reference in its second and third questions, concerned those two points, it may be presumed that it is the entire mechanism provided for in Article 167 *bis* of the GTC that is called in question in the light of the terms of the AFMP relating to the right of establishment.

98. As I have already stated, the Court held in the judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138), that the mechanism provided for in Article 167 *bis* of the GTC, introduced in order to prevent the risk of tax evasion, was incompatible with the freedom of establishment provided for in Article 52 of the EC Treaty (which became, after amendment, Article 43 EC, and then Article 49 TFEU).

99. In particular, the Court considered that Article 167 *bis* of the GTC greatly exceeded what was necessary in order to prevent tax evasion, in so far as that article was based on a presumption that any taxpayer transferring his tax residence to another Member State intended to circumvent French tax law.²⁹

100. In addition, examining the means of application of Article 167 *bis* of the GTC, namely the conditions relating to suspension of payment, the Court observed that that suspension of payment was not automatic, but was subject to strict conditions, including the obligation to provide guarantees sufficient to ensure recovery of the tax, which themselves involved restrictions on the exercise of freedom of establishment. In so far as those conditions were intended to implement the tax regime laid down in Article 167 *bis* of the GTC, which could not be justified by the objective of preventing tax evasion, that objective could not be relied on in support of those conditions.³⁰

101. In the judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraphs 49 to 51), which, it will be recalled, concerned the application of the Netherlands 'exit tax' regime to a different natural person, the Court found that the obligation to make a tax declaration, required at the time of the transfer of the tax residence, was proportionate to the objective of allocating the power of taxation between Member States, while it confirmed that the obligation to provide guarantees, necessary for the grant of a deferment of payment of the tax normally due immediately on leaving the territory, was disproportionate.

²⁹ Judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraphs 52 to 54).

³⁰ Judgment of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraphs 55 to 57).

102. At this stage of the reasoning, it must be ascertained whether the grounds of those judgments relating to the proportionality of the taxation of unrealised capital gains, including the conditions relating to the deferral of payment, may be taken into account for the purposes of interpreting the terms of the AFMP.

103. It follows from Article 16(2) of the AFMP that, in so far as the application of the AFMP involves concepts of Community law, account is to be taken of the relevant case-law of the Court prior to the date of signature of that agreement, that is to say, before 21 June 1999. That article states that case-law after that date is to be brought to the Swiss Confederation's attention and that, in order to ensure that the agreement works properly, the Joint Committee is to determine the implications of such case-law.

104. The reference to the expression 'concepts of Community law', which seems to act as a delimitation *ratione materiae* of the relevant case-law of the Court, together with the delimitation *ratione temporis* of the date of signature of the AFMP, is relatively vague.

105. That being so, the Court accepts that the principle of equal treatment, which is 'a concept of EU law', comes within that expression.³¹

106. The Court infers that, in order to determine whether there is any unequal treatment of taxpayers of the Contracting Parties in the context of the AFMP, it is necessary to refer to the principles already identified in the Court's case-law before 21 June 1999 and confirmed after that date, relating to the comparability of those taxpayers' situations and whether any difference in treatment can be justified by overriding reasons in the public interest, provided that that difference in treatment is appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary for that purpose.³²

107. The principle of proportionality, as interpreted in the context of the freedoms of movement guaranteed within the European Union, is therefore also a concept of EU law. The case-law of the Court prior to 21 June 1999, and confirmed after that date, concerning the interpretation of that principle should therefore be relevant for the interpretation of those terms of the AFMP.

108. If the Court should consider that it is already appropriate, in application of Article 16(2) of the AFMP, to follow the judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525), when interpreting the right of establishment conferred on self-employed persons by the AFMP, it should, in principle, take into account the case-law subsequent to those judgments, also dating from after 21 June 1999, which interprets the scope of the principle of proportionality.

109. However, that line of reasoning raises difficulties as regards the application of the principle of proportionality to regimes involving the 'exit' taxation of unrealised capital gains.

110. In the context of the case-law subsequent to the judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525), the Court has held that the legislation of a Member State which requires the immediate recovery of the tax on unrealised capital gains relating to elements of the assets of a company transferring its actual

³¹ See judgments of 6 October 2011, *Graf and Engel* (C-506/10, EU:C:2011:643, paragraph 26), and of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705, paragraph 47).

³² See, to that effect, judgment of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705, paragraphs 46 and 47). Paragraph 46 of that judgment refers to the judgment of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32 and the case-law cited), and to the judgment of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 38 and the case-law cited).

headquarters to another Member State at the time of that transfer was disproportionate. The Court considered that it was less harmful to freedom of establishment to leave to the taxpayer the choice between immediate payment of the tax and deferred payment of the tax, together, if appropriate, with interest in accordance with the applicable national legislation.³³

111. In the context of the exercise of the second option, the Court accepted, in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 74), that it was permissible for the Member State concerned to take account of the risk of non-recovery of the tax, which increases with the passage of time, in its national legislation applicable to deferred payment of tax debts, by measures such as the provision of a bank guarantee.³⁴

112. In previous Opinions I have wondered about the interaction between the Court's finding in paragraph 74 of the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785), and the passages in the judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525), which established that the obligation imposed on the taxpayer to provide a bank guarantee in order to benefit from deferred payment of the tax was disproportionate.³⁵

113. I had suggested that, in order to preserve the internal coherence of those judgments, a strict interpretation must be given to the requirement to provide a bank guarantee bank that might accompany the option to defer recovery of the tax debt. In that regard, I had considered that such a guarantee could be required only if there is a genuine and serious risk of non-recovery of the tax debt.³⁶

114. The Court appears to have been sensitive to that concern in its judgment of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20). After referring to the relevant passages from the three judgments cited above, the Court held, in paragraph 67 of that judgment, that the 'requirement [to provide a bank guarantee] cannot, as a matter of principle, be imposed without prior assessment of the risk of non-recovery', and made clear, in paragraph 69 of that judgment, that the risk must be an 'actual' risk.

115. More recently, in the judgment of 21 December 2016, *Commission v Portugal* (C-503/14, EU:C:2016:979, paragraphs 53 to 56), the Court held that the principles laid down in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785), could be applied by analogy in the context of the taxation of the unrealised capital gains of natural persons. It thus referred to paragraphs 73 and 74 of the latter judgment,³⁷ but omitted any reference to what in my view is the more nuanced approach found in paragraphs 67 and 69 of the judgment of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20), concerning the proportionality of the requirement to provide a bank guarantee in order to ensure the deferred recovery of the tax on the unrealised capital gains.

116. That brief analysis is intended to demonstrate that the Court's case-law relating to the proportionate nature of the mechanisms for the 'exit' taxation of unrealised capital gains between Member States has been developed in recent years, without being based on a consistent line of case-law established before the date of signature of the AFMP. That case-law, developed after 21 June 1999, is also, in my view, marked by inconsistencies, when it entails accepting, or not accepting, the possibility that a Member State may require a taxpayer to provide a bank guarantee where he opts for deferred payment of the tax on unrealised capital gains.

³³ See, to that effect, judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraphs 73 and 85); of 6 September 2012, *Commission v Portugal* (C-38/10, EU:C:2012:521, paragraphs 31 and 32); of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 61); and of 16 April 2015, *Commission v Germany* (C-591/13, EU:C:2015:230, paragraph 67).

³⁴ See also to that effect, judgment of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 65).

³⁵ See my Opinion in *Commission v Portugal* (C-38/10, EU:C:2012:391, points 78 to 82).

³⁶ See my Opinion in *Commission v Portugal* (C-38/10, EU:C:2012:391, points 81 and 82).

³⁷ Judgment of 21 December 2016, *Commission v Portugal* (C-503/14, EU:C:2016:979, paragraphs 58 to 60).

117. It is therefore difficult to say that the Court's case-law relating to the proportionality of the mechanisms for the 'exit' taxation of the unrealised capital gains confirms or consolidates the Court's case-law prior to 21 June 1999, which should be taken into account when interpreting the terms of the AFMP relating to the right of establishment of self-employed persons.

118. In case of doubt, it is appropriate, in my view, to take into account the intention of the Contracting Parties not to extend to the interpretation of the terms of the AFMP the Court's case-law developed after 21 June 1999, unless the Joint Committee, in accordance with the third sentence of Article 16(2) of the AFMP, has 'determine[d] the implications of such case-law'.

119. Admittedly, the mechanism provided for in Article 167 *bis* of the GTC does not offer a right to opt between immediate recovery of the tax and deferred payment. In the light of the judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 73), and of 21 December 2016, *Commission v Portugal* (C-503/14, EU:C:2016:979, paragraphs 58 and 59), that mechanism should be regarded as disproportionate.

120. Nonetheless, in the main proceedings, it is very difficult to imagine that, even on the assumption that that mechanism did offer such an option, Mr Picart would have chosen, in particular having regard to the value of the unrealised capital gains and the amount of the tax demanded, to be taxed immediately upon transferring his tax residence to Switzerland. It is more likely that he would have opted to defer payment until the capital gains were realised, which the French tax authorities did in fact allow him to do, at his request, on the basis of the possibility offered by Article 167 *bis* of the GTC.

121. As for the condition relating to the obligation to provide a guarantee in order to benefit from such deferred payment, as I have just shown, the Court's case-law does not provide a clear solution, even if it were assumed (*quod non*) that Mr Picart's situation came exclusively under Article 49 TFEU.

122. Thus, such a requirement would seem to be disproportionate if the reasoning in the judgments in *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138), *N* (C-470/04, EU:C:2006:525) and *DMC* (C-164/12, EU:C:2014:20), were followed. In fact, as the Commission indicated in its written observations, in so far as, although Mr Picart transferred his residence to Switzerland in June 2002, he retained sufficient holdings and assets in France — including, in particular, the companies in whose capital he held significant shareholdings — to enable the French tax authorities, in the event of lack of cooperation on the part of the taxpayer, to take protective measures in order to ensure recovery of the tax debts. The risk of a failure to recover the tax debt does not therefore seem to be an actual risk, within the meaning of the judgment of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 69).

123. Conversely, the obligation imposed on the taxpayer to provide a guarantee in order to benefit from deferred recovery of the tax would in all likelihood be proportionate if the reasoning applied by the Court in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 73), confirmed most recently in the judgment of 21 December 2016, *Commission v Portugal* (C-503/14, EU:C:2016:979, paragraph 59), were followed.

124. Having regard to the circumstances of the main proceedings, to the unequivocal case-law of the Court analysed above concerning the application of the principle of proportionality to the 'exit' taxation of unrealised capital gains and also to the Contracting Parties' intention, as expressed in the third sentence of Article 16(2) of the AFMP, I therefore consider that the terms of the AFMP relating to the right of establishment of self-employed persons do not preclude a fiscal measure such as that provided for in Article 167 *bis* of the GTC.

V. Conclusion

125. In the light of the principal considerations set out above, I propose that the Court answer the questions referred by the Conseil d'État (Council of State, France) as follows:

The right of establishment of a self-employed person, as laid down in Articles 1 and 4 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 (AFMP), signed in Luxembourg on 21 June 1999, and in Article 12(1) and Article 15(1) of Annex I to that agreement, must be interpreted as meaning that it extends only to a natural person wishing to pursue, or pursuing, a self-employed activity on the territory of a Contracting Party other than that of which he is a national, and on which he must be treated in the same way as a national of that State, that is to say, any overt or covert discriminatory measure on grounds of nationality must be prohibited. On the basis of the information provided by the referring court, the plaintiff in the main proceedings does not appear to fall within the scope of those terms of the agreement.