Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 July 2021 *

(Reference for a preliminary ruling – Freedom of movement for workers – Free movement of capital – Income tax – Legislation for the avoidance of double taxation – Income received in a Member State other than that of residence – Method of calculating the exemption in the Member State of residence – Loss of part of the benefit of certain tax advantages)

In Case C-241/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance du Luxembourg (Court of First Instance, Luxembourg, Belgium), made by decision of 1 April 2020, received at the Court on 5 June 2020, in the proceedings

BJ

v

État belge,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BJ, by N. Lequeux, avocate,

– the Belgian Government, by C. Pochet, P. Cottin and S. Baeyens, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and M.A.M. de Ree, acting as Agents,

– the European Commission, by W. Roels and V. Uher, acting as Agents,

* Language of the case: French.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45, Article 63(1) and Article 65(1)(a) TFEU.

2 The request has been made in proceedings between BJ and the État belge (Belgian State) concerning the loss of part of the tax advantages to which BJ would have been entitled if he had received all of his income in Belgium.

Legal context

The Belgium-Luxembourg Tax Convention

3 Paragraph 1 of Article 6 (headed 'Income from immoveable property') of the Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and wealth, signed in Luxembourg on 17 September 1970, in the version applicable to the facts in the main proceedings ('the Belgium-Luxembourg Tax Convention'), provides as follows:

'Income from immovable property may be taxed in the Contracting State in which that property is situated.'

4 Article 15 of that convention, headed 'Dependent personal services', provides, in paragraph 1:

'Without prejudice to the provisions of Articles 16, 18, 19, and 20, salaries, wages and other similar remuneration that a resident of a Contracting State receives in respect of employment shall be taxable only in that State unless the employment is pursued in the other Contracting State. If the employment is pursued there, such remuneration as is derived therefrom may be taxed in that other State.'

5 Article 23 of the Convention, headed 'Provisions to prevent double taxation', states, in paragraph 2(1):

'So far as concerns Belgian residents, double taxation shall be avoided in the following manner:

1. Income earned in Luxembourg – with the exception of the income referred to in subparagraphs 2 and 3 – and capital situated in Luxembourg, which are taxable in that State under the preceding articles, shall be exempt from tax in Belgium. That exemption shall not limit Belgium's right to take the income and capital thus exempted into account when determining its tax rate.'

6 Article 24 of that convention, headed 'Non-discrimination', provides, in paragraph 4(a):

'A natural person, resident in Belgium, who, in accordance with Articles 7 and 14 to 19, is liable to tax in Luxembourg on more than 50 per cent of his or her income from employment shall, at his or her

request, be taxed in Luxembourg, in respect of income taxable in that State in accordance with Articles 6, 7 and 13 to 19 of the Convention, at the average rate of tax which, taking into account his or her circumstances and family responsibilities and the total of his or her income generally, would apply to him or her if he or she were a resident of Luxembourg.'

Belgian law

7 Article 131 of the code des impôts sur les revenus (Income Tax Code) of 1992 ('the CIR 1992'), in the version applicable to the facts in the main proceedings, governs tax-free income allowances.

8 Tax reductions granted in respect of long-term savings and costs incurred in saving energy in the home are governed, respectively, by Article 145/1 and Article 145/24 of that code.

9 The first paragraph of Article 155 of that code is worded as follows:

'Income exempted under international conventions for the avoidance of double taxation shall be taken into account for the purposes of calculating tax, but the tax shall be reduced according to the proportion of the overall income represented by the exempted income.'

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

10 During the tax years 2006 to 2011, BJ, a Belgian tax resident, was employed in Luxembourg.

11 In addition, BJ owns an apartment in Luxembourg, rented for residential purposes to a natural person, and two properties situated in Belgium.

12 Under Article 6(1) and Article 15(1) of the Belgium-Luxembourg Tax Convention, BJ's income from immovable property and from employment of Luxembourg origin was taxable in Luxembourg and was taxed there pursuant to Article 24(4)(a) of that convention.

13 In accordance with Article 23(2)(1) of that convention and Article 155 of the CIR 1992, that income, which is exempt from tax in Belgium, was, in the first place, taken into account for the purposes of calculating the tax in that Member State. In the second place, tax reductions in respect of tax-free income allowances, long-term savings and costs incurred in saving energy in the home, provided for, respectively, in Article 131, Article 145/1 and Article 145/24 of the CIR 1992, were applied to the tax thus calculated. In the third place, pursuant to Article 155 of the CIR 1992, that tax was reduced in proportion to the share of BJ's total income that the exempted Luxembourg income represented.

14 By complaints lodged with the Belgian tax authorities, BJ challenged the order in which those two categories of tax reductions were applied. He argued that applying the tax reduction in respect of income exempted under international conventions for the avoidance of double taxation after applying the tax reductions in respect of tax-free income allowances, long-term savings and costs incurred in saving energy in the home, rather than before, prevented him from benefiting from those tax advantages in full and resulted in the loss – in proportion to his exempted Luxembourg income – of the benefit of part of those tax advantages, advantages to which he was entitled under Belgian legislation.

15 Following the rejection of those complaints, BJ brought an action before the tribunal de première instance du Luxembourg (Court of First Instance, Luxembourg, Belgium) seeking to obtain the full benefit of the tax advantages in question. According to that court, most of those tax advantages have been lost, since the reductions only very slightly reduced the tax on BJ's income of Belgian origin.

16 In that regard, the referring court asks, first of all, whether Article 45 TFEU must be interpreted as precluding national tax legislation such as the legislation at issue in the main proceedings. If so, the referring court enquires whether certain features of the main action might be of relevance to that interpretation. Lastly, that court also asks whether, in the light of the fact that BJ derives income from letting the apartment he owns in Luxembourg, Articles 63 and 65 TFEU must be interpreted as precluding such legislation.

17 In those circumstances, the tribunal de première instance du Luxembourg (Court of First Instance, Luxembourg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 45 TFEU preclude rules such as those at issue in the main proceedings – irrespective of whether or not they are laid down in a convention for the avoidance of double taxation – whereby a taxpayer forfeits, in the calculation of the income tax payable by him or her in his or her State of residence, part of the tax-free amount of that income and of his or her other personal tax advantages (such as a tax reduction for long-term savings, that is to say, premiums paid under an individual life insurance contract, and a tax reduction for costs incurred in energy savings) because, during the year in question, he or she also received income in another Member State which was taxed in that State?

(2) If the answer to the first question is in the affirmative, does that answer remain in the affirmative if the income received by the taxpayer in his or her State of residence is neither quantitatively nor proportionately significant but that State is nevertheless in a position to grant him or her those tax advantages?

(3) If the answer to the second question is in the affirmative, does that answer remain in the affirmative if, under a convention for the avoidance of double taxation between the State of residence and the other State, the taxpayer has enjoyed in that other State, in respect of income taxable in that other State, personal tax advantages under the tax legislation of that other State but those tax advantages do not include certain tax advantages to which the taxpayer is in principle entitled in the State of residence?

(4) If the answer to the third question is in the affirmative, does that answer remain in the affirmative if, notwithstanding the latter difference, the taxpayer obtains in that other State a tax reduction in an amount at least equivalent to that which he or she has lost in his or her State of residence?

(5) Are the answers to the questions the same in the light of [Article 63(1) and Article 65(1)(a) TFEU] in relation to rules such as those at issue in the main proceedings – irrespective of whether or not they are laid down in a convention for the avoidance of double taxation – whereby a taxpayer forfeits, in the calculation of the income tax payable by him or her in his or her State of residence, part of the tax-free amount of that income and of his or her other personal tax advantages (such as a tax reduction for long-term savings, that is to say premiums paid under an individual life insurance contract, and a tax reduction for costs

incurred in energy savings) because, during the year in question, he or she also received rental income in respect of a property owned by him or her in another Member State which was taxed in that State?'

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, in essence, whether Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State that has the consequence that a taxpayer resident in that Member State forfeits, in connection with the calculation of the income tax payable by him or her in that Member State, part of the benefit of the tax advantages granted by it, because that taxpayer receives income in respect of employment in another Member State, taxable in the latter and exempt from taxation in the Member State of residence pursuant to a bilateral convention for the avoidance of double taxation.

19 As a preliminary point, it is necessary to determine whether Article 45 TFEU is applicable to the dispute in the main proceedings.

20 In that regard, it should be borne in mind that, according to settled case-law, any EU national who, irrespective of his or her place of residence and his or her nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article 45 TFEU (judgment of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 32 and the case-law cited).

21 In the present case, it is apparent from the order for reference that the applicant in the main proceedings resides in Belgium and that, during the tax years at issue in the main proceedings, he was employed in Luxembourg.

22 Consequently, the situation of the applicant in the main proceedings falls within the scope of Article 45 TFEU.

23 That preliminary comment having been made, it should be borne in mind that, according to settled case-law, all the provisions of the TFEU relating to freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 77 and the case-law cited, and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 37 and the case-law cited).

24 As a result, Article 45 TFEU precludes any national measure which is capable of hindering or rendering less attractive the exercise by EU nationals of the fundamental freedoms guaranteed by that article (judgment of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850, paragraph 41 and the case-law cited).

25 Moreover, it is, in principle, a matter for the Member State of residence to grant the taxpayer all the tax advantages relating to his or her personal and family circumstances, because that State is, as a rule, best placed to assess the taxpayer's personal ability to pay tax, determined by reference to

his or her aggregate income and his or her personal and family circumstances, since that is where his or her personal and financial interests are centred (judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 26 and the case-law cited).

26 It follows that, in this instance, it is for the Kingdom of Belgium, as the Member State of residence of the applicant in the main proceedings, to grant him all the tax advantages relating to his personal and family circumstances.

27 In that regard, it should be noted that the tax advantages in question in the main proceedings, namely tax reductions in respect of tax-free income allowances, long-term savings and costs incurred in saving energy in the home, have been recognised by the Court as being related to the taxpayer's personal and family circumstances (judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraphs 33, 40 and 41).

28 The tax legislation at issue in the main proceedings provides that income exempted under international conventions for the avoidance of double taxation is, first of all, included in the tax base which is used to determine the tax rate applicable to non-exempt income from Belgium, the base tax being calculated on the basis of that tax base. Tax reductions in respect of tax-free income allowances, long-term savings and costs incurred in saving energy in the home are then applied to the base tax. It is only once those reductions have been applied that the base tax is reduced in proportion to the share of the total income that income exempted under international conventions for the avoidance of double taxation represents, in accordance with Article 155 of the CIR 1992.

29 As the Court has held, by applying tax reductions on a base that includes both non-exempt income from Belgium and income exempted under international conventions for the avoidance of double taxation, and by deducting from the tax the share representing the latter in the total amount of income forming the taxable base only subsequently, that legislation is liable to make a taxpayer, such as the applicant in the main proceedings, lose part of the benefit of the tax advantages that would have been granted to him or her in full had all of his or her income come from Belgium and if the tax reductions had thus been applied only to that income (judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 31).

30 Consequently, the applicant in the main proceedings suffered a disadvantage in so far as he did not benefit in full from the tax advantages to which he would have been entitled if he had received all of his income in Belgium (see, by analogy, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 42).

31 The legislation at issue in the main proceedings thus establishes a difference in tax treatment between EU citizens residing in Belgium according to the source of their incomes – a difference which is liable to discourage those citizens from exercising the freedoms guaranteed by the Treaty, in particular, the freedom of movement for workers guaranteed by Article 45 TFEU (see, to that effect, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 43 and the case-law cited).

32 Consequently, such national legislation constitutes an obstacle to the freedom of movement for workers, which is, in principle, prohibited by that article.

33 Such an obstacle is permissible only if it pursues a legitimate objective which is compatible with the Treaty and is justified by overriding reasons of public interest. It is also necessary, in such a case, that its application be appropriate for ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain that objective (judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 44 and the case-law cited).

34 In the present case, neither the Belgian Government nor, indeed, the referring court puts forward any justification. What is more, the Belgian Government considers that the first question is essentially identical to the question raised in the cases giving rise to the judgments of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750), and of 14 March 2019, *Jacob and Lennertz* (C-174/18, EU:C:2019:205), and should, therefore, be answered in the affirmative.

35 In the light of the foregoing considerations, the answer to the first question is that Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State that has the consequence that a taxpayer resident in that Member State forfeits, in connection with the calculation of the income tax payable by him or her in that Member State, a part of the benefit of the tax advantages granted by it, because that taxpayer receives income in respect of employment in another Member State, taxable in the latter and exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation.

The second question

36 By its second question, the referring court asks, in essence, whether the fact that the taxpayer concerned does not receive significant income in the Member State of residence, but that State is nevertheless in a position to grant him or her the tax advantages in question, is of relevance to the answer to the first question.

37 According to settled case-law, the Member State of employment is required to take into account personal and family circumstances only where the taxpayer derives almost all or all of his or her taxable income from employment in that State and where he or she has no significant income in his or her Member State of residence, so that the latter is not in a position to grant him or her the advantages resulting from taking account of his or her personal and family circumstances (judgment of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 56 and the case-law cited).

38 The Court has stated that that is the case where it is shown that the taxpayer concerned received, within the Member State where he or she was resident, either no income or income of so modest an amount that that State would not be able to grant him or her the advantages that would accrue from account being taken of his or her aggregate income and his or her personal and family circumstances (judgment of 9 February 2017, *X*, C-283/15, EU:C:2017:102, paragraph 39).

39 What remains the decisive criterion is whether it is impossible for a Member State to take into account, for the calculation of tax, the personal and family circumstances of a taxpayer in the absence of sufficient taxable income, although such circumstances can otherwise be taken into account when there is sufficient income (judgment of 9 February 2017, *X*, C-283/15, EU:C:2017:102, paragraph 42).

40 That is clearly not the case here since it is apparent from the order for reference that, irrespective of the amount of income received by the applicant in the main proceedings in the Member State of residence and the proportion of his total income it represents, that income is sufficient for the

Member State of residence to be in a position to tax it and to grant the applicant the advantages resulting from taking account of his personal and family circumstances, such as the tax reductions at issue in the main proceedings.

41 Thus, although the applicant in the main proceedings receives most of his income in Luxembourg, it follows from the order for reference that he receives sufficient income in Belgium for his personal and family circumstances to be taken into account in that Member State for the purpose of granting him tax advantages.

42 Accordingly, the answer to the second question is that the fact that the taxpayer concerned does not receive significant income in the Member State of residence is of no relevance to the answer to the first question, since that State is in a position to grant him or her those tax advantages in question.

The third question

43 By its third question, the referring court asks, in essence, whether the fact that, pursuant to a convention for the avoidance of double taxation between the Member State of residence and the Member State of employment, the taxpayer concerned has, in connection with the taxing of income that he or she received in the second Member State, enjoyed tax advantages under its tax legislation, but those tax advantages do not include some of the advantages to which the taxpayer is in principle entitled in the first Member State, is of relevance to the answer to the first question.

44 In that regard, it should be borne in mind that, in the absence of unifying or harmonising measures at EU level, Member States are free to alter, by way of bilateral or multilateral agreements for the avoidance of double taxation, the correlation between the total income of residents and residents' general personal and family circumstances to be taken into account by the Member State of residence. The Member State of residence can therefore be released by way of an international agreement from its obligation to take into account in full the personal and family circumstances of taxpayers residing in its territory who work partially in another Member State (judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 99).

45 Moreover, the Member State of residence may also be released from that obligation if it finds that, even in the absence of a convention, one or more of the Member States of employment, with respect to the income taxed by them, grant advantages based on the personal and family circumstances of taxpayers who do not reside in the territory of those Member States but receive taxable income there (judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 100).

46 However, the mechanisms used to eliminate double taxation or the national tax systems which have the effect of eliminating or alleviating double taxation must permit the taxpayers in the Member States concerned to be certain that, as the end result, all their personal and family circumstances will be duly taken into account, irrespective of how those Member States have allocated that obligation amongst themselves, in order not to give rise to inequality of treatment which is incompatible with the Treaty provisions on the freedom of movement for workers and in no way results from the disparities between the national tax laws (judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 101, and of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 70).

47 In the present case, it should be noted that it is not apparent from the provisions of the Belgium-Luxembourg Tax Convention that, under that convention, the Kingdom of Belgium is released from its obligation to take into account in full the personal and family circumstances of taxpayers residing in its territory who work partially in Luxembourg.

48 Article 24(4)(a) of that convention provides for the personal and family circumstances of the taxpayer concerned to be taken into account solely for the purposes of determining the average rate of tax to be applied to his or her taxable income in Luxembourg, without releasing the Kingdom of Belgium from that obligation.

49 Furthermore, the tax legislation at issue in the main proceedings does not establish any correlation between the tax advantages it grants to taxpayers residing in the Member State concerned and the tax advantages for which they may qualify in connection with their taxation in another Member State (judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 73), since the partial loss of the former advantages is not the result of qualifying for equivalent tax advantages in Luxembourg, but is the automatic consequence of receiving income exempted under international conventions for the avoidance of double taxation.

50 Moreover, it is apparent that, in the Member State of employment of the applicant in the main proceedings, his personal and family circumstances are taken into account only in part since, as is clear from the very wording of the third question, the tax advantages which he enjoyed in connection with the taxing in that Member State of the income that he received there do not include some of the advantages to which he is in principle entitled in his Member State of residence, namely the Kingdom of Belgium, part of the benefit of which he forfeits under that legislation.

51 Accordingly, neither the mechanisms used in the Belgium-Luxembourg Tax Convention to eliminate double taxation nor the national tax system at issue in the main proceedings permits Belgian tax residents to be certain that, as the end result, all their personal and family circumstances will be duly taken into account in the Member State of employment.

52 The answer to the third question is therefore that the fact that, pursuant to a convention for the avoidance of double taxation between the Member State of residence and the Member State of employment, the taxpayer concerned has, in connection with the taxing of income that he or she received in the second Member State, enjoyed tax advantages under the tax legislation of it, is of no relevance to the answer to the first question, since neither that convention nor the tax legislation of the Member State of residence provides for those advantages to be taken into account and since the latter do not include some of the advantages to which the taxpayer is in principle entitled in the Member State of residence.

The fourth question

53 By its fourth question, the referring court asks, in essence, whether the fact that, in the Member State of employment, the taxpayer concerned obtained a tax reduction in an amount at least equivalent to that of the tax advantages which he or she has lost in the Member State of residence is of relevance to the answer to the first question.

54 In that regard, it should be recalled that a Member State cannot rely on the existence of an advantage granted unilaterally by another Member State, in this case the Member State in which the taxpayer works and receives the bulk of his taxable income, to escape its obligations under the Treaty (see, to that effect, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 61 and the case-law cited).

55 The application of the tax legislation at issue in the main proceedings has the consequence that a taxpayer such as BJ, resident in Belgium and in receipt of taxable income there, automatically loses part of the benefit of the tax advantages to which he is in principle entitled under that legislation where he receives income in another Member State, income which is exempt in Belgium pursuant to a double taxation convention. Irrespective of the tax treatment accorded to that taxpayer in that other Member State, it is the automatic nature of that loss which is contrary to the freedom of movement for workers (see, to that effect, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 62).

56 Therefore, the fact that the personal and family circumstances of the applicant in the main proceedings, in connection with the taxing of income that he received in Luxembourg, were taken into account in part in that Member State and that, as a result, he qualified for a tax advantage there cannot, irrespective of the amount of that advantage, be relied on by the Member State of residence in order to escape its obligations under Article 45 TFEU.

57 In addition, it should be borne in mind that, in accordance with the case-law referred to in paragraphs 25, 37 and 46 above, it is for the Member State of residence and, where appropriate, the Member State of employment to permit their taxpayers to be certain that all their personal and family circumstances will be duly taken into account.

58 It cannot be inferred from the fact that, in Luxembourg, the applicant in the main proceedings obtained a tax reduction in an amount at least equivalent to that of the tax advantages which he lost in Belgium that his personal and family circumstances were taken into account in full, especially since it is apparent that those circumstances are taken into account only in part, since that tax reduction does not include some of the tax advantages to which he is in principle entitled in Belgium.

59 Moreover, as stated in paragraph 48 above, Article 24(4)(a) of the Belgium-Luxembourg Tax Convention provides for the personal and family circumstances of the taxpayer concerned to be taken into account solely for the purposes of determining the average rate of tax to be applied to his or her taxable income in Luxembourg.

60 Consequently, the answer to the fourth question is that the fact that, in the Member State of employment, the taxpayer concerned obtained a tax reduction in an amount at least equivalent to that of the tax advantages which he or she has lost in his or her Member State of residence is of no relevance to the answer to the first question.

The fifth question

61 By its fifth question, the referring court asks, in essence, whether Article 63(1) and Article 65(1)(a) TFEU must be interpreted as precluding the application of tax legislation of a Member State that has the consequence that a taxpayer resident in that Member State forfeits part of the benefit of the tax advantages granted by it, because that taxpayer receives income deriving from an

apartment of which he or she is the owner in another Member State, taxable in the latter and exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation.

62 Under Article 63(1) TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

63 In that regard, it should be borne in mind that the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital include those which are likely to discourage residents of one Member State from making investments in immovable property in other Member States (judgment of 12 April 2018, *Commission* v *Belgium*, C-110/17, EU:C:2018:250, paragraph 40 and the case-law cited).

64 It is apparent from the order for reference that, during the tax years at issue in the main proceedings, BJ received income from the letting of an apartment in Luxembourg for residential purposes.

65 Consequently, Article 63 TFEU is applicable to the dispute in the main proceedings.

66 In that context, it must be held that the tax legislation at issue in the main proceedings, as explained in particular in paragraph 28 above, applies to all income exempted under an international convention for the avoidance of double taxation.

67 Income from immovable property situated in Luxembourg is, under the Belgium-Luxembourg Tax Convention, taxable in that Member State and exempt from tax in Belgium.

68 However, as with the income received by the applicant in the main proceedings in respect of employment in Luxembourg, by applying tax reductions on a base that includes both non-exempt income from Belgium and income exempted under international conventions for the avoidance of double taxation, and by deducting from the tax the share representing the latter in the total amount of income forming the taxable base only subsequently, the application of the tax legislation at issue in the main proceedings also caused the applicant to suffer a disadvantage because it had the effect of depriving him of part of the benefit of the tax advantages to which he would have been entitled if all of his income from immoveable property had derived from properties situated in Belgium.

69 Thus, that legislation establishes a difference in treatment between taxpayers residing in Belgium depending on whether they receive income from immovable property situated in Belgium or in another Member State, which is liable to discourage them from making investments in immovable property in Member States other than the Kingdom of Belgium.

70 Consequently, that legislation constitutes a restriction on the movement of capital, which is prohibited in principle by Article 63(1) TFEU.

71 Under Article 65(1)(a) TFEU, Article 63 TFEU is to be without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

72 In so far as Article 65(1)(a) TFEU is a derogation from the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (judgment of 11 September 2014, *Verest and Gerards*, C-489/13, EU:C:2014:2210, paragraph 26 and the case-law cited).

73 Indeed, the derogation provided for in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) TFEU 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63' (judgment of 11 September 2014, *Verest and Gerards*, C-489/13, EU:C:2014:2210, paragraph 27 and the case-law cited).

74 According to settled case-law, a distinction must be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. For national tax legislation to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, it is necessary that the difference in treatment should concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (see, to that effect, judgment of 12 April 2018, *Commission* v *Belgium*, C-110/17, EU:C:2018:250, paragraph 55 and the case-law cited).

75 In the present case, it should be noted that, under the combined provisions of Article 6 and Article 23(2)(1) of the Belgium-Luxembourg Tax Convention and also Article 155 of the CIR 1992, the Kingdom of Belgium provided, with regard to Belgian tax residents, for an exemption method with 'maintenance of progressivity', pursuant to which, if income from immovable property situated in Luxembourg is taxable in that Member State and exempt from tax in Belgium, that income is taken into account for the purposes of determining the tax rate applicable to income taxable in Belgium.

76 That method serves to ensure that the income of a taxpayer that is exempt in the Member State of residence may nevertheless be taken into account by that Member State for the purpose of applying the rule of progressivity when calculating the amount of tax on the taxpayer's remaining income (see, to that effect, judgment of 11 September 2014, *Verest and Gerards*, C-489/13, EU:C:2014:2210, paragraph 30 and the case-law cited).

77 In that regard, the Court has previously ruled that the objective of such a rule is to prevent, in the Member State of residence, a lower rate of tax being applied to the taxable income of a taxpayer who is the owner of immovable property situated in another Member State than the rate applicable to the income of taxpayers who are the owners of comparable properties in the Member State of residence (judgment of 11 September 2014, *Verest and Gerards*, C-489/13, EU:C:2014:2210, paragraph 31).

78 Thus, in the light of that objective, the situation of taxpayers who have acquired immovable property in the Member State of residence is comparable to that of taxpayers who have acquired such a property in another Member State (judgment of 11 September 2014, *Verest and Gerards*, C-489/13, EU:C:2014:2210, paragraph 32).

79 In addition, neither the Belgian Government nor, indeed, the referring court has put forward any overriding reason in the public interest capable of justifying the difference in treatment established by the legislation at issue in the main proceedings between those two categories of taxpayer.

80 In those circumstances, national tax legislation such as that at issue in the main proceedings cannot be regarded as compatible with the Treaty provisions on the free movement of capital, in particular Article 63(1) and Article 65(1)(a) TFEU.

81 In the light of the foregoing considerations, the answer to the fifth question is that Article 63(1) and Article 65(1)(a) TFEU must be interpreted as precluding the application of tax legislation of a Member State that has the consequence that a taxpayer resident in that Member State forfeits a part of the benefit of the tax advantages granted by it, because that taxpayer receives income deriving from an apartment of which he or she is the owner in another Member State, taxable in the latter and exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation.

Costs

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

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

1. **Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State that has the consequence that a taxpayer resident in that Member State forfeits, in connection with the calculation of the income tax payable by him or her in that Member State, a part of the benefit of the tax advantages granted by it, because that taxpayer receives income in respect of employment in another Member State, taxable in the latter and exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation.**

2. **The fact that the taxpayer concerned does not receive significant income in the Member State of residence is of no relevance to the answer to the first question referred, since that Member State is in a position to grant him or her those tax advantages in question.**

3. **The fact that, pursuant to a convention for the avoidance of double taxation between the Member State of residence and the Member State of employment, the taxpayer concerned has, in connection with the taxing of income that he or she received in the second Member State, enjoyed tax advantages under the tax legislation of it, is of no relevance to the answer to the first question referred, since neither that convention nor the tax legislation of the Member State of residence provides for those advantages to be taken into account and since the latter do not include some of the advantages to which the taxpayer is in principle entitled in the Member State of residence.**

4. The fact that, in the Member State of employment, the taxpayer concerned obtained a tax reduction in an amount at least equivalent to that of the tax advantages which he or she has lost in his or her Member State of residence is of no relevance to the answer to the first question referred.

5. Article 63(1) and Article 65(1)(a) TFEU must be interpreted as precluding the application of tax legislation of a Member State that has the consequence that a taxpayer resident in that Member State forfeits a part of the benefit of the tax advantages granted by it, because that taxpayer receives income deriving from an apartment of which he or she is the owner in another Member State, taxable in the latter and exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation.

[Signatures]