JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2013 (*)

(Freedom of establishment – Equal treatment – Income tax – Legislation for the avoidance of double taxation – Income earned in a State other than the State of residence – Method of exemption subject to progressivity in the State of residence – Account taken, in part, of personal and family circumstances – Loss of certain tax advantages linked to the personal and family circumstances of the worker)

In Case C?303/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal de première instance de Liège (Belgium), made by decision of 31 May 2012, received at the Court on 21 June 2012, in the proceedings

Guido Imfeld,

Nathalie Garcet

v

État belge,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 22 April 2013,

after considering the observations submitted on behalf of:

– Mr Imfeld and Ms Garcet, by M. Levaux and M. Gustin, avocats,

– the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

– the Estonian Government, by M. Linntam, acting as Agent,

– the European Commission, by F. Dintilhac and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Mr Imfeld and Ms Garcet, a couple residing in Belgium, and the Belgian State regarding the taking into account, in the calculation of their joint tax liability in Belgium, of income earned in another Member State by Mr Imfeld, which is exempt from tax in Belgium but which serves as a basis of assessment for the grant of tax advantages linked to personal and family circumstances, with the result that Mr Imfeld and Ms Garcet are deprived of some of the advantages to which they would be entitled were that income not taken into account.

Legal context

The 1967 Convention

3 The Convention between the Kingdom of Belgium and the Federal Republic of Germany for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and wealth, including occupational taxes and land tax, signed in Brussels on 11 April 1967 (*Moniteur belge* of 30 July 1969) ('the 1967 Convention') provides, in its article 14, headed 'Liberal professions':

'1. Income generated by a resident of a Contracting State from a liberal profession or other similar self-employed professional activities shall be taxable only in that State, unless the resident concerned has available to him in the other Contracting State, on a regular basis, a fixed base for the exercise of his activities. If he has such a fixed base, the income may be taxed in the other State but only in so far as it is attributable to the activities carried out through that fixed base.

2. The term "liberal profession" includes, in particular, self-employed activities ... of doctors, lawyers, engineers, architects, dentists and accountants.'

4 Article 23 of the 1967 Convention provides, inter alia, in paragraph 2(1) thereof, that income earned in Germany, which is taxable in that State under that convention, is exempt from tax in Belgium. The same provision states, however, that the exemption does not limit the right of the Kingdom of Belgium to take income thus exempted into account for the purposes of determining tax rates.

Belgian law

5 Pursuant to Article 126(1) and (2) of the 1992 Income Tax Code (code des impôts sur le revenue) (*Moniteur belge* of 30 July 1992), in the version applicable at the date of the facts in the main proceedings ('the 1992 ITC'):

'1. Whatever the matrimonial property regime, income of the partners other than earned income shall be combined with the earned income of the partner who receives the higher earned income.

2. The amount of tax to be levied shall be determined in the names of both partners.'

6 Article 131 of the 1992 ITC grants to each taxpayer a tax-free income allowance. In accordance with Article 132 of the 1992 ITC, that tax-free allowance is to be increased where the taxpayer has dependants.

7 Where the tax is determined in the name of partners, that increase is, in accordance with the second subparagraph of Article 134(1) of the 1992 ITC, set off, as a priority, against the income of the spouse who receives the higher earned income. Article 134(1) of the 1992 ITC thus provides:

‘The tax-free income allowance shall be determined by reference to each taxpayer and shall include the total basic amount, increased as the case may be, and supplements as referred to in Articles 132 and 133.

Where joint taxation is determined, the supplements referred to in Article 132 shall be set off against the income of the taxpayer who has the higher taxable income. ...’

8 Article 155 of the 1992 ITC provides as follows:

‘Income exempted under international conventions for the prevention 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 same procedure shall apply to:

– income exempt under other international treaties or agreements, in so far as they provide for a subject to progressivity clause;

...

Where joint taxation is determined, the reduction shall be calculated by reference to the total net income of each taxpayer.’

9 Moreover, following the judgment in Case C?385/00 *de Groot* [2002] ECR I?11819, the Kingdom of Belgium adopted Circular No Ci.RH.331/575.420 of 12 March 2008, providing for a reduction in tax for income which is exempted under an international convention, in addition to the reduction provided for in Article 155 of the 1992 ITC (‘the Circular of 2008’).

10 That circular states:

‘1. In the Belgian tax system, tax advantages linked to the personal and family circumstances of the taxpayer … are applied both to Belgian income and to foreign income. If the personal and family circumstances in question have not been taken into account abroad, a part of those advantages is lost.

The Netherlands applies a system of exemption subject to progressivity similar to that practised in Belgium. In its judgment [*de Groot*, the Court] however held that that practice was contrary to the legislation on the freedom of movement for persons in the [European Union].

Belgium was requested by the European Commission to bring the Belgian tax provisions relating to the application of the system of exemption subject to progressivity … into conformity with the obligations under Articles 18 [EC], 39 [EC], 43 [EC] and 56 [EC] …

The following approach has been adopted: in cases where the personal and family circumstances of the taxpayer have not been taken into account abroad, a reduction in tax for income earned abroad will be granted in addition to the reduction provided for under Article 155 [of the 1992] ITC.

...

3. A supplementary reduction for income which is exempted from tax under a convention may

be granted only if the following conditions are met:

– the taxpayer received income exempted from tax under a convention in one or more Member States of the [European Economic Area (EEA)];

– the personal or family circumstances of the taxpayer were not taken into account for the purposes of calculating the tax payable, in the States in question, on the income exempt from tax in Belgium;

– the taxpayer has been unable, in Belgium, to qualify in full for the tax advantages linked to his personal or family circumstances;

– the amount of tax payable in Belgium, together with the tax payable abroad, is higher than the amount of tax which would have been payable if the income had been entirely earned in Belgium and the related taxes had been payable in Belgium.

4. In order to claim the supplementary reduction, a taxpayer must produce proof that he meets the necessary conditions.'

The disputes in the main proceedings

11 Mr Imfeld, a German national, and Ms Garcet, a Belgian national, are married with two children and live in Belgium. Although, under national law, spouses are in principle to be taxed jointly, for the 2003 and 2004 tax years they completed separate tax returns in Belgium, without stating that they were married.

12 Mr Imfeld, who practises as a lawyer in Germany, where he earns all his income, did not mention any taxable income in Belgium or any dependants. In contrast, Ms Garcet, who is employed in Belgium, declared mortgage interest, two dependent children and childcare costs.

13 Those tax returns have given rise to three disputes brought before the referring court, which form the basis of the present order for reference.

The disputes relating to the 2003 tax year

14 On 5 April 2004 the Belgian tax authorities initially determined the amount of tax payable for the 2003 tax year solely in Ms Garcet's name.

15 However, on 16 November 2004 those authorities held that Ms Garcet could not be considered to be single and therefore issued a correction notice stating that the applicants in the main proceedings would be taxed jointly and determining a new amount of tax payable on the basis of the income declared by Ms Garcet and the income earned by Mr Imfeld in a self-employed capacity in Germany.

16 By letter of 9 December 2004, the applicants in the main proceedings expressed their disagreement with that correction notice, objected to joint taxation and requested individual assessment, in order to ensure freedom of establishment and the actual and full exemption of the income earned in Germany by Mr Imfeld.

17 On 13 December 2004 the tax authority notified the applicants in the main proceedings of the review decision, stating that Mr Imfeld's income earned in Germany was fully exempt but that the joint taxation had to take account of childcare costs, the tax-free income allowance and reductions in respect of replacement income.

18 On 10 February 2005 the amount of tax to be levied for the 2003 tax year was determined solely in Ms Garcet's name on income adjusted to zero, an amount against which a complaint was brought by the applicants in the main proceedings on 9 March 2005.

19 That complaint having been rejected by a decision of the Liège (Belgium) Regional Director for Direct Taxation of 11 July 2005, the applicants in the main proceedings brought proceedings against that decision before the referring court on 29 September 2005.

20 On 13 October 2005 the amount of tax to be levied for the 2003 tax year was determined in the joint names of the applicants in the main proceedings, an amount against which they brought a complaint on 13 January 2006.

21 That complaint having been rejected by decision of the Liège Regional Director for Direct Taxation of 7 March 2006, the applicants in the main proceedings brought proceedings against that decision before the referring court on 31 March 2006.

The dispute relating to the 2004 tax year

22 On 24 June 2005 the amount of tax to be levied for the 2004 tax year was determined in the joint names of the applicants in the main proceedings. They lodged a complaint against that determination on 15 September 2005.

23 That complaint having been rejected by decision of the Liège Regional Director for Direct Taxation of 19 October 2005, the applicants in the main proceedings brought proceedings against that decision before the referring court on 21 November 2005.

The tax treatment of the income earned in Germany by Mr Imfeld

24 Under the 1967 Convention, Mr Imfeld was taxed in Germany on his income earned in that Member State. It is apparent from his reply to the written question put by the Court, that, in connection with the income tax paid in Germany, he qualified for an advantage for dependent children in the form of a tax-free income allowance ('Freibetrag für Kinder').

25 Mr Imfeld was taxed as an individual, that is without entitlement to the 'Ehegattensplitting' regime, a joint tax regime to which married taxpayers who are not permanently separated and who are liable to tax in Germany while residing in another Member State are entitled under Paragraph 1a(1)(2) of the Law on Income Tax (Einkommensteuergesetz). It is apparent from the order for reference and from the file before the Court that, in respect of the 2003 tax year, the German tax authorities refused to accept that Mr Imfeld qualified for that tax regime.

26 The action brought by Mr Imfeld against that refusal was dismissed by a judgment of the Finanzgericht Köln (Cologne Finance Court) (Germany) of 25 July 2007, since, on the one hand, his taxable income in Germany was less than 90% of the total income of his household and, on the other hand, his wife's income was higher than both the absolute threshold of EUR 12 372 and the relative threshold of 10% of income from foreign sources, laid down by the German tax legislation. The Finanzgericht Köln pointed out, inter alia, that the Court of Justice had endorsed those thresholds in its judgment in Case C?391/97 *Gschwind* [1999] ECR I?5451, paragraph 32.

27 The appeal brought by Mr Imfeld against that judgment was dismissed by a judgment of the Bundesfinanzhof (Federal Finance Court) (Germany) on 17 December 2007.

The referring court's analysis and the question referred for a preliminary ruling

28 The referring court states that the assessment of Mr Imfeld and Ms Garcet together complies with the law. The partners were taxed jointly in accordance with Article 126(1) of the 1992 ITC and the amount of tax to be levied on the applicants in the main proceedings was determined in both their names. Pursuant to the second subparagraph of Article 134(1) of the 1992 ITC, the increase in the tax?free income allowance for dependent children, referred to in Article 132(3) of the 1992 ITC, was ‘set off, as a priority, against the income of the partner who receives the higher earned income’, in the present case against the income earned by Mr Imfeld.

29 That court raises the issue of whether the method of calculation of the tax payable in Belgium complies with European Union law. It considers that, through the application of the system of exemption subject to progressivity, taxpayers such as the applicants in the main proceedings lose some of the tax-free allowances to which they are entitled on account of their personal and family circumstances because of the fact that those allowances are set off, as a matter of priority, against the income of the partner who receives the higher earned income, even if that income is exempt under an international convention for the avoidance of double taxation. In this connection, the referring court is of the opinion that the combined application of Articles 155 and 134(1) of the 1992 ITC in a cross-border situation such as that of the applicants in the main proceedings may infringe European Union law.

30 It was in those circumstances that, joining the various disputes brought before it by the applicants in the main proceedings, the Tribunal de première instance de Liège (Liège Court of First Instance) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is it contrary to Article 39 [EC] that, as a result of the provisions made under the Belgian tax system, specifically under Article 155 of the 1992 [ITC] and the second subparagraph of Article 134(1) of [the 1992 ITC], and regardless of whether [the Circular of 2008] is applied, the income earned in Germany by the first applicant – which is exempt from tax [in Belgium] pursuant to Article [14] of the [1967 Convention] – is taken into account for the purposes of calculating the tax payable in Belgium and is used as the basis of assessment for the grant of tax advantages provided for under the [1992 ITC], and those advantages, such as the tax-free allowance arising from the first applicant’s family circumstances, are reduced or granted to a lesser extent than if the income of both applicants were earned in Belgium and if the higher income were that earned by the second applicant, rather than by the first applicant, whereas, in Germany, the first applicant is taxed as an individual on his earned income and he can accordingly not obtain all the tax advantages linked to his personal and family circumstances, of which the German tax authorities take account only in part?’

Consideration of the question referred for a preliminary ruling

Preliminary observations

31 The referring court in essence requests the Court of Justice to rule on the compatibility with European Union law of the tax treatment accorded by a Member State, in this case the Kingdom of Belgium, to the income of a couple residing in that Member State, one of whom earns income in that State while the other is a self-employed professional in another Member State, in this case the Federal Republic of Germany, where he earns the whole of his income, which represents the greater part of the couple’s income and which is taxable in Germany and exempt from taxation in Belgium under an international convention for the avoidance of double taxation.

32 It must be stated that, although two tax advantages linked to the personal and family circumstances of the taxpayers are at issue in the main proceedings, namely the deduction of

childcare costs and the grant of the supplementary tax?free income allowance for dependent children, the referring court's question is more specifically directed at 'the tax-free allowance arising from the first applicant's family circumstances', while referring to the method of calculation set out in the second subparagraph of Article 134(1) of the 1992 ITC.

33 By that wording, the referring court describes the tax advantage consisting of the supplementary tax-free income allowance for dependent children provided for in Article 132 of the 1992 ITC. It states that such a tax advantage is granted under Belgian law to the couple as a unit and, by virtue of the method of calculation set out in Article 134 of the 1992 ITC, according to which that supplement is calculated on the basis of its being set off against the higher taxable income of one of the two spouses, the advantage is, in a situation such as that of the applicants in the main proceedings, reduced or granted to a lesser extent than if those applicants both earned income in Belgium and if Ms Garcet, rather than Mr Imfeld, had had the higher income.

34 The ability to deduct childcare costs is consequently not among the advantages mentioned in the referring court's question. As the Belgian Government confirmed at the hearing, the calculation of the deduction of childcare costs follows different rules since such a deduction is granted by means of an apportionment as between the income of each partner. It added that, in the present case, Ms Garcet qualified for a deduction of childcare costs *pro rata* in accordance with the ratio of her income to the overall income of the couple.

The freedom applicable to the situation of the applicants in the main proceedings

35 The referring court mentions in its question Article 39 EC, to which Article 45 TFEU now corresponds, relating to the freedom of movement for workers, while referring several times, in the explanations provided in the order for reference, to freedom of establishment.

36 Mr Imfeld, who is a German national residing in Belgium, works in Germany as a lawyer, where he is self-employed. Indeed, the provision of the 1967 Convention expressly cited by the referring court as being applicable to the disputes in the main proceedings concerns the liberal professions and similar self-employed activities.

37 Consequently, Mr Imfeld's situation does not fall within the ambit of the freedom of movement for workers but freedom of establishment, which includes, for citizens of the European Union, the right to take up and pursue activities as self?employed persons (see, inter alia, Case C?9/02 *De Lasteyrie du Saillant* [2004] ECR I?2409, paragraph 40).

38 As the Court has repeatedly held, even if the referring court limited its request for a preliminary ruling solely to the interpretation of freedom of movement for workers, the Court is not thereby precluded from providing the national court with all those elements for the interpretation of European Union law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its question (see, to that effect, Case C?152/03 *Ritter?Coulais* [2006] ECR I?1711, paragraph 29, and Case C?544/07 *Rüffler* [2009] ECR I?3389, paragraph 57).

39 The question must therefore be understood as referring to Article 43 EC, to which Article 49 TFEU now corresponds.

The question

40 By its question, the referring court asks, in essence, whether Article 49 TFEU is to be interpreted as precluding the application of the tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect that a couple residing in that Member State

and earning income both in that Member State and in another Member State, where one of the members of the couple is taxed separately on his earned income and cannot obtain all of the tax advantages linked to his personal and family circumstances, does not receive a specific tax advantage, owing to the rules for offsetting it, even though that couple would be entitled to it if the members of the couple earned all or most of their incomes in the Member State of residence.

Whether there is a restriction on freedom of establishment

41 First of all, it should be noted that, in accordance with settled case-law, in the absence of unifying or harmonising measures adopted by the European Union, the Member States retain competence for determining the criteria for taxation on income and capital with a view to eliminating double taxation by means, inter alia, of international conventions. In that context, the Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation (see, inter alia, *de Groot*, paragraph 93; Case C?527/06 *Renneberg* [2008] ECR I?7735, paragraph 48; and Case C?168/11 *Beker* [2013] ECR, paragraph 32).

42 However, that allocation of fiscal jurisdiction does not allow Member States to apply measures contrary to the freedoms of movement guaranteed by the FEU Treaty. As far as concerns the exercise of the power of taxation so allocated by bilateral conventions to prevent double taxation, the Member States must comply with European Union rules (*de Groot*, paragraph 94; *Renneberg*, paragraphs 50 and 51; and *Beker*, paragraphs 33 and 34).

43 It is also settled case-law of the Court that it is a matter for the State of residence, in principle, to grant the taxpayer all the tax advantages relating to his personal and family circumstances, because that State is, without exception, best placed to assess the taxpayer's personal ability to pay tax, since that is where his personal and financial interests are centred (see, inter alia, Case C?279/93 *Schumacker* [1995] ECR I?225, paragraph 32; Case C?87/99 *Zurstrassen* [2000] ECR I?3337, paragraph 21; and *Beker*, paragraph 43).

44 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 taxable income from employment in that State and where he has no significant income in his State of residence, so that the latter is not in a position to grant him the advantages resulting from taking account of his personal and family circumstances (see, inter alia, *Schumacker*, paragraph 36; *Gschwind*, paragraph 27; *Zurstrassen*, paragraphs 21 to 23; and *de Groot*, paragraph 89).

45 It is in the light of those principles that the compatibility with freedom of establishment of the application of the Belgian legislation to a situation such as that at issue in the main proceedings must be examined.

46 In the present case, the applicants in the main proceedings were taxed jointly on their income in Belgium, where they live, the income earned by Mr Imfeld in Germany being exempt, and Mr Imfeld was taxed as an individual on the income he earned in Germany, where he works, in accordance with the 1967 Convention.

47 Both in Germany and in Belgium account was taken, at least in part, of their personal and family circumstances. Mr Imfeld was entitled, under the German tax legislation, to a tax exemption for dependent children ('Freibetrag für Kinder'), but was not able, however, to qualify for the 'Ehegattensplitting' regime.

48 Under the Belgian tax legislation, the couple formed by the applicants in the main proceedings is, in principle, entitled to the supplementary tax?free income allowance for

dependent children. It was however unable actually to receive this. The supplementary income allowance which might have been exempted from tax was in fact set off against Mr Imfeld's income earned in Germany, since it was the couple's higher income. However, that income was then taken away from the taxable amount, since it was exempt under the 1967 Convention, so that, in the end, there was no tax-free income allowance in the specific form of the supplementary allowance for dependent children.

49 Consequently, tax legislation such as that at issue in the main proceedings, and specifically the combined application of the system of exemption subject to progressivity provided for in Article 155 of the 1992 ITC and the rules for offsetting the supplementary tax-free income allowance for dependent children established in Article 134 of the 1992 ITC, places couples who are in the situation of the applicants in the main proceedings, which is characterised by the fact that the greater part of their income is earned in a Member State other than the Kingdom of Belgium, at a disadvantage compared with couples who earn all or most of their income in Belgium.

50 The applicants in the main proceedings suffered, as a couple, a disadvantage since they did not obtain the tax advantage resulting from application of the supplementary tax-free income allowance for dependent children to which they would have been entitled if they had earned all their income in Belgium or, at least, if the income earned by Ms Garcet in Belgium had been higher than that earned by her husband in Germany.

51 The legislation at issue in the main proceedings thus establishes a difference in tax treatment between European Union citizen couples residing in the Kingdom of Belgium according to the source and size of their incomes which is likely to discourage those citizens from exercising the freedoms guaranteed by the Treaty, inter alia freedom of establishment (see, to that effect, *Beker*, paragraph 52).

52 That legislation is thus likely to discourage the nationals of the Kingdom of Belgium from exercising their right to freedom of establishment by pursuing an economic activity in another Member State while continuing to live in the Kingdom of Belgium (see, inter alia, Case C?251/98 *Baars* [2000] ECR I?2787, paragraphs 28 and 29, and Case C?314/08 *Filipiak* [2009] ECR I?11049, paragraph 60).

53 It is also likely to discourage the nationals of Member States other than the Kingdom of Belgium from exercising, as European Union citizens, their right to freedom of movement by establishing their residence in that Member State, inter alia for the purposes of family unity, while continuing to carry on an economic activity in the Member State of which they are nationals.

54 Furthermore, the Belgian tax legislation does not take into consideration cross?border situations such as that at issue in the main proceedings and therefore does not make it possible to compensate for the negative effects which it is likely to have on the exercise of the freedoms guaranteed to European Union citizens by the Treaty.

55 As the Commission points out in its written observations, the purpose of the rule for setting off the supplementary tax-free income allowance for dependent children against the higher of the couple's incomes is, in principle, to maximise the effect of the advantage in order to benefit the couple as a unit, including the partner with the lower income. Since the tax scale is progressive, the attribution of the supplementary allowance to the partner with the higher income is more advantageous to the couple than its allocation in equal parts or even proportionally. Paradoxically, that rule, when applied in a cross-border situation such as that at issue in the main proceedings, has exactly the opposite effect in certain circumstances, in the present case where the partner with the higher income earns all his income in a Member State other than the Kingdom of Belgium.

56 Contrary to what the Belgian Government claims, the restriction thus identified on freedom of establishment is not the inevitable consequence of the disparity of the national laws at issue in the main proceedings.

57 The couple formed by the applicants in the main proceedings was deprived of some of the exemptions provided for resident couples because of the fact that one of them exercised his freedom of establishment and because of the rules for offsetting the supplementary tax-free income allowance for dependent children provided for by the Belgian tax legislation (see, to that effect, *de Groot*, paragraph 87).

58 Nor can the Belgian Government claim that the tax legislation at issue in the main proceedings does not constitute a restriction on freedom of establishment because Mr Imfeld's exercise of his freedom of establishment did not make his tax situation any worse, in so far as, first, he did not have to pay, in Germany, higher taxes than he would have paid in Belgium and, second, his personal and family circumstances were taken into account in Germany, so that the Kingdom of Belgium was completely free of any obligation in that regard.

59 Admittedly, as is apparent from the statement of the facts in the main proceedings, in the present case Mr Imfeld was able to benefit from the fact of his personal and family circumstances being partially taken into account in Germany, by means of the grant of a tax exemption for dependent children ('Freibetrag für Kinder').

60 However, it cannot be considered that the grant of that tax advantage in Germany might compensate for the loss of the tax advantage recorded by the applicants in the main proceedings in Belgium.

61 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 Mr Imfeld works and earns all his income, to escape its obligations under the Treaty, in particular under the Treaty provisions on freedom of establishment (see, to that effect, Case C?379/05 *Amurta* [2007] ECR I?9569, paragraph 78; Case C?11/07 *Eckelkamp and Others* [2008] ECR I?6845, paragraph 69; and Case C?43/07 *Arens?Sikken* [2008] ECR I?6887, paragraph 66).

62 The tax legislation at issue in the main proceedings establishes a tax advantage for couples in the form, in particular, of a supplementary tax-free income allowance for dependent children, which is set off against the income of the member of the couple who earns the greater part of their income, but fails to take any account whatsoever of the fact that, after exercising the freedoms guaranteed by the Treaty, he may be in a position of not earning income as an individual in Belgium, with the direct and automatic consequence that the couple then loses the entire benefit of that advantage. Irrespective of the tax treatment accorded to Mr Imfeld in Germany, it is the automatic nature of that loss which is contrary to freedom of establishment.

63 Therefore, the fact that, in the cases in the main proceedings, Mr Imfeld's personal and family circumstances were partially taken into account in Germany in respect of his taxation as an individual and that he was consequently able to receive a tax advantage there cannot be relied on by the Belgian Government to demonstrate that there is no restriction on freedom of establishment.

Whether the restriction on freedom of establishment is justified

64 According to settled case?law, a measure which is liable to restrict the freedom of establishment enshrined in Article 49 TFEU is permissible only if it pursues a legitimate objective

compatible with the Treaty and is justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it (see, inter alia, *De Lasteyrie du Saillant*, paragraph 49; Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraph 35; and Case C?311/08 *SGI* [2010] ECR I?487, paragraph 56).

65 The Belgian Government submits that, even if the tax legislation at issue in the main proceedings is a restriction on freedom of establishment, it is, in any event, justified by the need to safeguard the balanced distribution of the power of taxation between the Member States.

66 In particular, that government infers from *Schumacker* and *de Groot* that there is a correlation between the taxation of income and the taking into account of taxpayers' personal and family circumstances, to the effect that those circumstances should be taken into account in the State of residence only where there is taxable income in that State. The Belgian Government points out that the 1967 Convention provides that income earned in the State of employment is exempt from tax in the State of residence. It is characteristic of a system of exemption that it reduces the taxable amount to zero and prevents deductions from being made, irrespective of whether or not they are linked to personal and family circumstances.

67 According to the Belgian Government, to go beyond non-taxation by transferring to another taxpayer the tax advantages linked to personal and family circumstances would go beyond what is required by European Union law as interpreted by the Court in *de Groot*, from which it follows only that the advantages must be fully granted and fully deductible from taxable income. Transferring the advantages to the partner would be tantamount to undermining the right of the Kingdom of Belgium to exercise its fiscal jurisdiction in relation to the activities carried out in its territory by that partner.

68 It must be observed in this connection that, admittedly, the preservation of the allocation of the power to impose taxes between Member States may constitute an overriding reason in the public interest justifying a restriction on the exercise of freedom of movement within the European Union (*Beker*, paragraph 56).

69 However, the Court has already held that such a justification cannot be invoked by a taxpayer's State of residence in order to evade its responsibility in principle to grant to the taxpayer the personal and family allowances to which he is entitled, unless that State is released by way of an international agreement from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory who work partially in another Member State or it finds that, even in the absence of such an agreement, one or more of the 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 States but earn taxable income there (see, to that effect, *de Groot*, paragraphs 99 and 100, and *Beker*, paragraph 56).

70 In that context, the Court stated, in paragraph 101 of *de Groot*, that 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 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 persons and in no way results from disparities between national tax laws.

71 Those arguments may be transposed to the situation of the couple formed by the applicants in the main proceedings.

72 First, the 1967 Convention does not impose on the Member State of employment any obligation to take into account the personal and family circumstances of taxpayers living in the other Member State which is party to that convention.

73 Secondly, the tax legislation at issue in the main proceedings does not establish any correlation between the tax advantages which it grants to the residents of the Member State concerned and the tax advantages for which they may qualify in connection with their taxation in another Member State. The applicants in the main proceedings failed to benefit from the supplementary tax-free income allowance for dependent children, not because they benefited from an equivalent advantage in Germany, but only because the benefit of it was nullified by the rules for its offsetting.

74 The Belgian Government also observes in that regard that the 2008 Circular, which constitutes a mechanism establishing such a correlation, is not applicable to Mr Imfeld's situation.

75 In any event, a justification related to the need to safeguard the balanced allocation between the Member States of the power to tax may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its fiscal jurisdiction in relation to activities carried out in its territory (see, to that effect, Case C?347/04 *Rewe Zentralfinanz* [2007] ECR I?2647, paragraph 42; Case C?231/05 *Oy AA* [2007] ECR I?6373, paragraph 54; *SGI*, paragraph 60; and *Beker*, paragraph 57).

76 In the present case, were the Kingdom of Belgium fully to grant the benefit of deductions of a personal and family nature to the applicants in the main proceedings, that right would not be jeopardised. By doing so, that Member State would not surrender part of its fiscal jurisdiction to other Member States. As the Commission points out, in the present case, the loss of the advantage granted to the couple affects a partner who remains subject to Belgian taxation. The restrictive effect for the couple lies not in the disadvantageous treatment of Mr Imfeld's tax-free income but in the disadvantageous treatment of the income of his partner, Ms Garcet, obtained exclusively in Belgium and subject in its entirety to Belgian tax, without her receiving the tax advantages at issue.

77 Further, the Estonian government considers that the aim of the Belgian tax legislation at issue in the main proceedings is to ensure that the taxpayer's personal and family circumstances are not taken into account simultaneously in two Member States and do not consequently lead to the unjustified grant of a double advantage. It points out, from this perspective, that the Court has accepted that the Member States must be able to prevent the double deduction of losses and refers, in this connection, to paragraph 47 of *Marks & Spencer*.

78 As the Advocate General observed in point 82 of his Opinion, even if the different tax advantages granted respectively by the two Member States concerned are comparable and it may be concluded that the applicants in the main proceedings did actually receive a double advantage, that fact is, in any event, only the result of the parallel application of the Belgian and German tax laws, as agreed between those two Member States in the terms set out by the 1967 Convention.

79 On the other hand, it is open to the Member States concerned to take into consideration the tax advantages which may be granted by another Member State imposing tax, provided that, irrespective of how those Member States have allocated that obligation amongst themselves, their taxpayers are guaranteed that, as the end result, all their personal and family circumstances will

be duly taken into account.

80 Consequently, the answer to the question referred is that Article 49 TFEU is to be interpreted as precluding the application of the tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect that a couple residing in that Member State and earning income both in that Member State and in another Member State does not in fact receive a specific tax advantage, by reason of the rules for offsetting it, where that couple would receive the tax advantage if the member of the couple earning the higher income did not earn his entire income in another Member State.

Costs

81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fifth Chamber) hereby rules:

Article 49 TFEU is to be interpreted as precluding the application of the tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect that a couple residing in that Member State and earning income both in that Member State and in another Member State does not in fact receive a specific tax advantage, owing to the rules for offsetting it, whereas that couple would receive that tax advantage if the member of the couple earning the higher income did not earn his entire income in another Member State.

[Signatures]

*Language of the case: French.