Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

22 June 2017 (*)

(Reference for a preliminary ruling — Freedom of movement of workers — Income received in a Member State other than the Member State of residence — Method of exemption with maintenance of progressivity in the Member State of residence — Pension and health insurance contributions levied on income received in a Member State other than the Member State of residence — Deduction of those contributions — Condition relating to the absence of a direct link with exempted tax revenues)

In Case C?20/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 16 September 2015, received at the Court on 15 January 2016, in the proceedings

Wolfram Bechtel,

Marie-Laure Bechtel

v

Finanzamt Offenburg,

THE COURT (Tenth Chamber),

composed of M. Berger, President of the Chamber, E. Levits (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2017,

after considering the observations submitted on behalf of:

– Mr and Mrs Bechtel, by J. Garde, Rechtsanwalt,

– the Finanzamt Offenburg, by E. Lehmann, acting as Agent,

– the German Government, by T. Henze, R. Kanitz and D. Klebs, acting as Agents,

– the European Commission, by W. Roels and M. Wasmeier, acting as Agents,

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 TFEU.

2 The request has been made in proceedings between Mr Wolfram Bechtel and Mrs Marie-Laure Bechtel, and the Finanzamt Offenburg (Offenburg tax office, Germany) concerning the inclusion of pension and health insurance contributions, paid by Mrs Bechtel in France, in the calculation of their taxable income and the special tax rate to be applied to their taxable income for the years 2005 and 2006.

Legal context

German law

3 In accordance with Paragraph 1 of the Einkommensteuergesetz (Law on income tax) of 2002, in the version applicable to the dispute in the main proceedings ('the EStG 2002'), natural persons whose place of residence or habitual residence is in Germany are fully liable to income tax.

4 Paragraph 2 of that law, concerning the extent of taxation and definitions, provides:

'(1) The following are liable to income tax:

...

4. revenue *(Einkünfte)* from employment

...

(2) revenue *(Einkünfte)* means

...

2. surplus income over and above professional expenses in the case of other categories of income (Paragraphs 8 to 9a).

(3) total revenue *(Einkünfte)*, less the proportional tax allowance for elderly retired persons, the amount of the tax exemption for single parents and the deduction provided for in Paragraph 13(3), constitutes the total amount of revenue *(Gesamtbetrag der Einkünfte)*.

(4) the total of the sources of income, less special expenses and extraordinary charges, constitutes income *(Einkommen)*.

(5) income *(Einkommen)*, less the tax-free allowances referred to in Paragraph 32(6) and the other amounts to be deducted from income constitutes taxable income *(versteuerndes Einkommen)*, which forms the income tax basis of assessment according to the scale. ...'

5 Paragraph 9 of the EStG 2002, entitled, 'Occupational expenses', provides:

'(1) Occupational expenses are expenses incurred in the acquisition, safeguarding and maintenance of income. They must be deducted from the category of income in which they were generated. Occupational expenses shall also include:

...

3. contributions to professional bodies and other professional associations whose purpose is not related to any commercial undertakings,

...'

6 Paragraph 10 of the EStG 2002, entitled, 'Special expenses', provides in subparagraph 1, point 1, that special expenses are the charges listed in that provision where they are neither operating costs nor occupational expenses. Paragraph 10(1), points 2 and 3, of the EStG 2002 lists the charges which constitute special expenses, and is worded as follows:

2.

(a) contributions to statutory pension insurance schemes or agricultural retirement funds, and to occupational pension schemes providing benefits comparable to statutory pension schemes;

(b) the taxable person's contributions to the creation of a capital-covered retirement scheme where the contract makes provision only for payment, from the age of 60 onwards, of a monthly life annuity for the life of the taxable person, or additional insurance for incapacity to work (disability pension), for a reduction of working capacity (partial incapacity pension), or to surviving dependants (survivor's pension); ... The above rights may not be inherited, nor are they transferable; they may not be pledged, sold or capitalised, nor do they give any entitlement to an indemnity.

It is necessary to add to the contributions referred to in (a) and (b) above the employer's tax-exempt contribution ... to the statutory pension insurance scheme and a tax-exempt allowance from the employer which is treated in the same way.

3.

(a) contributions for unemployment insurance, insurance against incapacity to earn or work not falling under the first sentence of point 2(b), sickness, healthcare, accident and civil liability insurance, and risk insurance which provides benefits only in the event of death;

...'

7 Paragraph 10(2) of the EStG 2002 provides:

'It is a condition for the deduction of the amounts identified in subparagraph 1, points 2 and 3 (provident expenses), that they

1. have no direct economic link with tax-exempt income,

...'

8 Paragraph 10(3) of the EStG 2002 provides that the provident expenses referred to in Paragraph 10(1), point 2, second sentence, of that law are taken into consideration up to a ceiling of EUR 20 000; that ceiling is multiplied by two in the case of joint taxation of spouses.

9 Paragraph 32a of the EStG 2002, entitled 'Rate of income tax' is worded as follows:

'(1) Income tax subject to the scale is calculated on the basis of the taxable income *(versteuernde Einkommen)*. Subject to Paragraphs 32b, 34, 34b and 34c, respectively, the tax

shall be, in euros, for taxable income:

1. up to EUR 7 664 (basic tax free amount): 0;

2. from EUR 7 665 to EUR 12 739: (883.74 × y + 1 500) × y;

3. from EUR 12 740 to EUR 52 151: (228.74 × z + 2 397) × z + 989;

4. from EUR 52 152: 0.42 × x –7 914.

“y” represents one ten thousandth of the amount exceeding EUR 7 664 of the taxable income rounded up. “z” represents one ten thousandth of the amount exceeding EUR 12 739 of the taxable income rounded up. “x” represents the taxable income rounded up. The resulting tax amount must be rounded up to the nearest euro.’

10 Under the terms of Article 32b of the EStG 2002, entitled ‘Maintenance of progressivity’:

‘(1) If a person who is subject to unlimited income tax liability, temporarily or during the entire tax period, or a person who is subject to limited tax liability, to whom Article 50(5), fourth sentence, point 2, applies ... received:

...

3. revenue *(Einkünfte)* which, provided it is included when the income tax is calculated, is exempt from tax under an agreement for the avoidance of double taxation or any other international agreement, or income not subject to German income tax during the tax period pursuant to Paragraph 1(3) or Paragraph 1a or Paragraph 50(5), second sentence, point 2, where the sum of the income is positive,

a special tax rate shall be applied to the taxable income *(versteuernde Einkommen)* in accordance with Paragraph 32a(1).

...

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

...

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

...’

The Franco-German Convention

11 The Convention concluded between the French Republic and the Federal Republic of Germany of 21 July 1959 for the avoidance of double taxation and making provision for rules for mutual legal and administrative assistance (BGBl. II 1961, p. 397), as amended by the Additional Agreements of 9 June 1969 (BGBl. II 1970, p. 717), of 28 September 1989 (BGBl. II 1990, p. 770), and of 20 September 2001 (BGBl. II 2002, p. 2370) (‘the Franco-German Convention’), provides in Article 14(1):

‘Salaries, wages and similar remuneration, and retirement pensions, paid by one of the Contracting States, by a Land or by a legal person of that State or Land governed by public law to natural persons resident in the other State in consideration for present or past administrative or military services shall be taxable only in the first State. ...’

12 Article 20(1) of the Franco-German Convention provides:

‘In the case of persons residing in the Federal Republic, double taxation shall be avoided as follows:

(a) subject to the provisions of subparagraphs (b) and (c), revenue from France and assets situated in France which, pursuant to this Convention, are taxable in France shall be excluded from the basis of assessment for German taxation. This provision shall not restrict the right of the Federal Republic to take into account, when determining its tax rate, the income and assets so exempted.

...’

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

13 The appellants in the main proceedings are married and, in 2005 and 2006, they resided in Germany where they were subject to joint assessment for income tax purposes.

14 In 2005 and 2006, Mr Bechtel received income in respect of his employment as a civil servant with the German civil service, while Mrs Bechtel, a French national, worked as a civil servant for the French tax authority, for which she received a gross salary of EUR 22 342 in 2005 and EUR 24 397 in 2006, respectively.

15 According to her wage slips, Mrs Bechtel’s gross remuneration had been reduced by the following items: withholding tax, contribution to the civil service pension, contribution to the civil service pension in respect of monthly allowance for expertise, contribution to the mutual fund for tax officials, additional insurance contributions for invalidity and survivors’ pensions for finance officials, employee contribution for health insurance, and additional pension contribution for the public sector.

16 The Offenburg tax authority excluded Mrs Bechtel’s gross remuneration for the years 2005 and 2006 from the income tax basis of assessment for Mr and Mrs Bechtel’s income, as it was exempt income under the Franco-German Convention.

17 However, after deducting the items ‘civil service pension’ and ‘civil service pension in respect of monthly allowance for expertise’, that gross remuneration was included in the calculation of the rates of tax, pursuant to the progressivity clause referred to in Paragraph 32b(1), point 3, of the EStG 2002 in order to calculate the special tax rate applicable to the taxable income of the appellants in the main proceedings.

18 Taking the view that the contributions deducted from Mrs Bechtel’s salary should have been deducted from the amount of the salary used for the calculation in the context of the progressivity clause, the appellants in the main proceedings brought an action before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Wurtemberg, Germany). When that action was dismissed by judgment of 31 July 2013, they brought an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court, Germany).

19 That court states that, in accordance with Article 14(1) and Article 20(1)(a) of the Franco-

German Convention, Mrs Bechtel's income from her employment in France must be excluded from Mr and Mrs Bechtel's German income tax basis of assessment. However, it is common ground between the parties to the main proceedings that, under Paragraph 32b(1), point 3, of the EStG 2002, that income must be included in the calculation of a special tax rate applicable to the taxable income of the appellants in the main proceedings.

20 According to the referring court, under the applicable German legislation, the provident expenses included in Mrs Bechtel's gross remuneration do not fall substantively within the scope of the notion of 'occupational expenses', for the purposes of Paragraph 9 of the EStG 2002.

21 On the other hand, the subscriptions relating to the mutual fund for tax officials, additional insurance for invalidity and survivors' pensions for finance officials, the additional pension for the public sector and the employee contribution for health insurance may fall within the scope of the special expenses, because those provident expenses correspond to the cases referred to in Paragraph 10(1), point 2(a), or Paragraph 10(1), point 3(a) of the EStG 2002.

22 However, Paragraph 10(2), point 1, of the EStG 2002 makes the deduction of expenses under the heading of special expenses subject to the condition that they have no direct economic link with tax-exempt income. Since Mrs Bechtel's remuneration is tax-exempt in Germany, that direct economic link has been established and the deduction of provident expenses as special expenses is not possible, irrespective of whether, for the years 2005 and 2006, the ceiling for the deduction of the special expenses laid down in Paragraph 10(3) of the EStG 2002 was reached without her provident expenses, something which the contested decisions do not mention.

23 Nor can Mrs Bechtel's provident contributions be deducted for the purposes of determining the special tax rate applicable to the disposable income of Mr and Mrs Bechtel, in accordance with Paragraph 32b of the EStG 2002. Paragraph 32b(2), point 2, of the EStG 2002 provides that revenue *(Einkünfte)* has to be taken into account. At the stage when revenue *(Einkünfte)* is determined, special expenses may not be deducted.

24 The referring court has doubts as to whether the prohibition on deducting the provident expenses as special expenses is compatible with EU law. According to that court, the refusal to grant to the resident taxpayer the right either to deduct from the basis of assessment in Germany the amount of social security contributions paid in another Member State or to reduce the tax payable in Germany by the amount of social security contributions paid in another Member State may deter that taxpayer from exercising the right to free movement of workers, and so may constitute an unjustified restriction on that fundamental freedom.

25 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 39 EC (now Article 45 TFEU) preclude a provision of German law according to which contributions to the French pension and health insurance fund paid by an employee living in Germany but working for the French civil service — in contrast to comparable contributions paid by an employee working in Germany to the German social security fund — do not reduce the income tax basis of assessment, if, under the Convention between Germany and France for the avoidance of double taxation, the salary may not be taxed in Germany and only increases the tax rate to be applied to other income?

(2) Is question 1 to be answered in the affirmative even if, within the framework of the taxation of the salary by France, the insurance contributions in question — whether specifically or at a flat rate —

(a) are taken into account as reducing tax, or

(b) could have been taken into account in reducing tax, but were not the subject of a claim to that effect and therefore were not actually taken into account? ’

Consideration of the questions referred

26 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 45 TFEU must be interpreted to the effect that it precludes legislation of a Member State, such as that at issue in the main proceedings, under which a taxpayer residing in that Member State and working for the public administration of another Member State may not deduct from the income tax basis of assessment in her Member State of residence the pension and health insurance contributions deducted from her wages in the Member State of employment, in contrast to comparable contributions paid to the social security fund of her Member State of residence, where, under the Convention for the avoidance of double taxation between the two Member States, the wages must not be taxed in the worker’s Member State of residence and merely increase the tax rate to be applied to other income.

27 The referring court also asks what importance must be attached to the fact that, in the context of the taxation of wages by the Member State of employment, the insurance contributions in question, whether specifically or at a flat rate, were deducted for tax purposes or could have been, but were not, as no claim had been made to that effect.

The relevant freedom of movement

28 It is appropriate, as a preliminary point, to examine whether Article 45 TFEU, an interpretation of which is sought by the referring court, can be relied upon in a situation such as that at issue in the main proceedings which relates to the tax treatment, by a Member State, of income received by a resident of that Member State in respect of employment in the public administration of another Member State, and, in particular pension and health insurance contributions deducted from that income in the Member State of employment.

29 The appellants in the main proceedings claim that, in so far as they are neither employees nor self-employed workers, the situation at issue in the main proceedings should be assessed in the light of the first paragraph of Article 18 TFEU.

30 In that regard, it should be observed at the outset that it is settled case-law that Article 18 TFEU, which lays down a general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by EU law for which the TFEU lays down no specific rules of non-discrimination (see, inter alia, judgments of 12 May 1998, *Gilly*, C?336/96, EU:C:1998:221, paragraph 37; of 26 November 2002, *Oteiza Olazabal*, C?100/01, EU:C:2002:712, paragraph 25; of 15 September 2011, *Schulz-Delzers and Schulz*, C?240/10, EU:C:2011:591, paragraph 29, and of 25 October 2012, *Prete*, C?367/11, EU:C:2012:668, paragraph 18).

31 In relation to the right of freedom of movement for workers, the principle of non-discrimination was implemented by Article 45 TFEU (see, inter alia, judgments of 12 May 1998, *Gilly*, C?336/96, EU:C:1998:221, paragraph 38; of 10 September 2009, *Commission* v *Germany*, C?269/07, EU:C:2009:527, paragraphs 98 and 99; of 15 September 2011, *Schulz-Delzers and Schulz*, C?240/10, EU:C:2011:591, paragraph 29, and of 25 October 2012, *Prete*, C?367/11, EU:C:2012:668, paragraph 19).

32 According to settled case-law, any EU national who, irrespective of his place of residence and his 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 (judgments of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraph 76; of 2 October 2003, *van Lent*, C?232/01, EU:C:2003:535, paragraph 14; of 13 November 2003, *Schilling and Fleck-Schilling*, C?209/01, EU:C:2003:610, paragraph 23, and of 16 February 2006, *Öberg*, C?185/04, EU:C:2006:107, paragraph 11).

33 As regards the issue whether Mrs Bechtel, who is an employee of the public administration of one Member State, whilst residing in another Member State, comes within the definition of 'worker', for the purposes of Article 45 TFEU, it is important to remember that the legal nature of the employment relationship is of no consequence in regard to the application of Article 45 TFEU and the fact that the worker is employed as a civil servant, or even that the employment relationship is governed by public law rather than by private law, is irrelevant in that respect (see judgment of 26 April 2007, *Alevizos*, C?392/05, EU:C:2007:251, paragraph 68 and the case-law cited).

34 It is true that Article 45(4) TFEU provides that the provisions of Article 45(1) to (3) TFEU, which lay down the fundamental principle of the freedom of movement for workers and the abolition of all discrimination based on nationality between workers of the Member States, do not apply to employment in the public service. However, taking account of the fundamental nature, in the scheme of the Treaty, of the principles of freedom of movement and equality of treatment of workers within the European Union, the exceptions made by that provision cannot have a scope going beyond the aim in view of which that derogation was included (judgments of 12 February 1974, *Sotgiu*, 152/73, EU:C:1974:13, paragraph 4, and of 26 April 2007, *Alevizos*, C?392/05, EU:C:2007:251, paragraph 69).

35 That aim is to allow only Member States the opportunity of restricting admission of foreign nationals to certain positions in the public service (judgment of 12 February 1974, *Sotgiu*, 152/73, EU:C:1974:13, paragraph 4), which presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality (see judgment of 17 December 1980, *Commission* v *Belgium*, 149/79, EU:C:1980:297, paragraph 10). Article 45(4) TFEU cannot, conversely, have the effect of disentitling a worker, once admitted into the public service of a Member State, to the application of the provisions contained in Article 45(1) to (3) TFEU (judgment of 26 April 2007, *Alevizos*, C?392/05, EU:C:2007:251, paragraph 70 and the case-law cited).

36 Accordingly, Mrs Bechtel comes within the definition of a 'worker' for the purposes of Article 45 TFEU and her employment in the public administration of a Member State does not have the effect of denying her the rights and protection which that article affords her.

The existence of a restriction of Article 45 TFEU

37 It is established case-law that the provisions of the Treaty on 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 them at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, inter alia, judgments of 13 November 2003, *Schilling and Fleck-Schilling*, C?209/01, EU:C:2003:610, paragraph 24; of 21 February 2006, *Ritter-Coulais*, C?152/03, EU:C:2006:123, paragraph 33; of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C?182/06, EU:C:2007:452, paragraph 17, and of 16 October 2008, *Renneberg*, C?527/06, EU:C:2008:566, paragraph 43).

38 The point made in the preceding paragraph concerns measures which might place EU citizens at a disadvantage when they wish to pursue an occupational activity in the territory of a Member State other than that of their residence. This includes, in particular, EU nationals wishing to continue to pursue an economic activity in a given Member State after having transferred their residence to another Member State (judgment of 16 October 2008, *Renneberg*, C?527/06, EU:C:2008:566, paragraph 44).

39 Article 45 TFEU precludes, inter alia, measures which, even if they apply regardless of nationality, are intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that they will place the former at a particular disadvantage (see, to that effect, judgments of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* , C?514/12, EU:C:2013:799, paragraph 26 and the case-law cited, and of 2 March 2017, *Eschenbrenner*, C?496/15, EU:C:2017:152, paragraph 36).

40 In the main proceedings, it is apparent from the order for reference that the appellants in the main proceedings were jointly taxed on their income in Germany where they resided. The wages which Mrs Bechtel received for her employment in the French public administration were not included in Mr and Mrs Bechtel's basis of assessment, by virtue of Article 14(1) and Article 20(1) of the Franco-German Convention. Those wages were, however, taken into account, by virtue of Article 20(1) of that convention, for the purposes of determining the special tax rate applicable to the disposable income of the appellants in the main proceedings, calculated in accordance with Paragraph 32b of the EStG 2002.

41 It is also clear from the order for reference that certain additional pension and health insurance contributions were deducted from the wages paid to Mrs Bechtel in France. Those contributions could not have been deducted from the total amount of Mr and Mrs Bechtel's wages as special expenses. Although, in the opinion of the referring court, those contributions fall substantively within the scope of the cases referred to in Paragraph 10(1), points 2 and 3, of the EStG 2002, they could not be deducted when calculating the taxable income of Mr and Mrs Bechtel, given that they had a direct economic link with the exempt income, and Mrs Bechtel's wages were not taxed in Germany.

42 For the purposes of determining the special tax rate applicable to the disposable income of Mr and Mrs Bechtel in accordance with Paragraph 32b of the EStG 2002, Mrs Bechtel's wages were taken into account, but it was not possible for the additional pension and health insurance contributions to be deducted. In accordance with Paragraph 32b(2) of the EStG 2002, the calculation of a special tax rate results from the increase in the taxable income *(versteuernde Einkommen)* by revenue *(Einkünfte)* which is exempt. First, the additional pension and health insurance contributions could not have been deducted when the taxable income of the appellants in the main proceedings was calculated, given that those contributions did not fulfil the condition laid down in Paragraph 10(2) of the EStG 2002, and secondly, it was not possible to deduct those contributions at the stage of calculating the revenue *(Einkünfte)* which was exempt, defined in accordance with Paragraph 2(2), point 2, of the EStG 2002 as surplus income over and above occupational expenses.

43 The possibility of deducting the additional pension and health insurance contributions as special expenses when calculating the taxpayer's taxable income amounts to a tax advantage, inasmuch as it makes it possible to reduce the taxable income and the rate applicable to that income.

44 The condition laid down in Paragraph 10(2) of the EStG 2002, by which the provident expenses must not have a direct economic link with the exempt income, leads to that advantage

being refused in situations, such as the one at issue in the main proceedings, where a resident taxpayer receives wages in a Member State other than her Member State of residence and where those wages are exempt from taxation in her Member State of residence, whilst being taken into account in the tax rate applicable to the other income of that taxpayer.

45 It is true, as the German Government submits, that the condition relating to the absence of a direct economic link with the exempt income may be applied, not only in cross-border situations, but also in purely domestic situations.

46 However, when asked to provide examples of national income and expenditure falling within the scope of Paragraph 10(2) of the EStG 2002, the German Government referred to the pension insurance contributions due as a result of the drawing of sickness, invalidity and home-help benefits, pension and health insurance contributions due on additional remuneration paid for working on Sundays, on national holidays and at night, or pension and health insurance contributions due as a result of receiving lump-sum payments from an employer, which are exempt from tax in Germany.

47 Those types of benefits, additional remuneration or allowances are not comparable to wages and salaries paid in consideration of work carried out by employees in the private sector or contractual agents in the public sector who, unlike German civil servants, are subject to social security charges. It is clear from the court-file and from the proceedings before the Court that employees in the private sector and contractual agents in the public sector who are residents and who receive wages and salaries from Germany from which provident contributions comparable to those at issue in the main proceedings are withheld, could deduct those contributions from their taxable income.

48 The Court therefore finds that, whilst being indistinctly applicable, the condition relating to the absence of a direct economic link with exempt income may have a greater impact on resident taxpayers receiving wages in a Member State other than that of their residence, which are exempt in their Member State of residence.

49 The refusal to deduct additional pension and health insurance contributions levied in France, such as those at issue in the main proceedings, leads, first, to the taxable income of taxpayers, such as the appellants in the main proceedings, being increased, and secondly, to the special tax rate being calculated on the basis of that increased taxable income, without that rate being corrected by taking those contributions into consideration in another way, which would not have been the case if Mrs Bechtel had received her wages in Germany instead of France.

50 Such disadvantageous treatment is liable to discourage resident workers from looking for, accepting or remaining in employment in a Member State other than their Member State of residence.

51 National legislation, such as that at issue in the main proceedings, which makes the deduction of provident expenses subject to the condition that they must not have a direct economic link with exempt income, in a situation such as that at issue in the main proceedings, therefore constitutes a restriction on the free movement of workers, prohibited, as a rule, by Article 45 TFEU.

The existence of a justification

52 Such a restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest (see, inter alia, judgments of 17 December 2015, *Timac Agro Deutschland*, C?388/14, EU:C:2015:829, paragraph

26, and of 26 May 2016, *Kohll and Kohll-Schlesser*, C?300/15, EU:C:2016:361, paragraph 45).

53 As regards whether the situations at issue are objectively comparable, it must be recalled that the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue (see, to that effect, judgments of 25 February 2010, *X Holding*, C?337/08, EU:C:2010:89, paragraph 22; of 6 September 2012, *Philips Electronics UK*, C?18/11, EU:C:2012:532, paragraph 17, and of 26 May 2016, *Kohll and Kohll-Schlesser*, C?300/15, EU:C:2016:361, paragraph 46).

54 In the present case, the German Government submits that a purely national situation, where the wages of a taxpayer are subject to Germany's power to impose taxes, is not objectively comparable to a cross-border situation, such as the one at issue in the main proceedings, where the Federal Republic of Germany is not entitled to tax the wages in question by virtue of the Franco-German Convention, even though Mrs Bechtel is subject to unlimited tax liability in that Member State.

55 In that regard, it should be recalled that it follows from the Court's case-law 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, judgments of 14 February 1995, *Schumacker*, C?279/93, EU:C:1995:31, paragraph 32; of 16 May 2000, *Zurstrassen*, C?87/99, EU:C:2000:251, paragraph 21; of 28 February 2013, *Beker and Beker*, C?168/11, EU:C:2013:117, paragraph 43, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 43).

56 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 Member 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, judgments of 14 February 1995, *Schumacker*, C?279/93, EU:C:1995:31, paragraph 36; of 14 September 1999, *Gschwind*, C?391/97, EU:C:1999:409, paragraph 27; of 16 May 2000, *Zurstrassen*, C?87/99, EU:C:2000:251, paragraphs 21 to 23; of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraph 89, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 44).

57 As regards the advantages arising from his personal or family circumstances being taken into account, a resident taxpayer receiving income in a Member State other than the Member State of residence is not in a comparable situation to that of a resident taxpayer receiving income in his Member State of residence, in particular where the Member State of residence of the former taxpayer is not in a position to grant him those advantages due to the absence of a significant income in that Member State.

58 However, this is not the case in the main proceedings. As a result of Mr and Mrs Bechtel being taxed jointly, even in a situation where Mrs Bechtel does not have a significant income in her Member State of residence, that Member State is in a position to grant her the advantages resulting from taking into account her personal or family circumstances, such as the deductions of the contributions at issue in the main proceedings.

59 Mrs Bechtel is therefore in a situation comparable to that of a resident taxpayer receiving income in the Member State of residence.

60 The restriction can therefore be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of

the objective that it pursues and not go beyond what is necessary to attain it (judgments of 17 December 2015, *Timac Agro Deutschland*, C?388/14, EU:C:2015:829, paragraph 29 and the case-law cited, and of 26 May 2016, *Kohll and Kohll-Schlesser*, C?300/15, EU:C:2016:361, paragraph 49).

61 In that regard, the German Government argues that the refusal to allow a deduction for special expenses in relation to exempt income is justified by overriding reasons in the public interest concerning the balanced allocation of powers of taxation between the Federal Republic of Germany and the French Republic, and the cohesion of the national tax system.

62 First, the German Government submits that, in accordance with the first sentence of Article 14(1) of the Franco-German Convention, the French Republic is entitled to tax income paid by the French State and that the allocation of powers of taxation thus agreed would be compromised if the Federal Republic of Germany was obliged to take into account all of Mrs Bechtel's social security contributions as special expenses without relying on the total global income.

63 Secondly, if the provisions of Paragraph 10(2), point 1, of the EStG 2002 made it possible take into account the social security contributions paid in France for the calculation of the taxable income in Germany, they would be contrary to the principle of the cohesion of tax systems, in that, although the exempt income paid in France is not taken into account in the calculation of the basis of assessment, Mrs Bechtel could still deduct the provident expenses when being taxed jointly with her spouse. The increased tax rate in the context of the spouses' maintenance of progressivity would be corrected through the deduction of expenses when the taxable income is calculated. In addition, the advantage arising from the deduction of insurance contributions would have a direct link with the taxation of the corresponding income and, in the present case, if Mrs Bechtel were to be denied the theoretical advantage of deducting those insurance contributions, she would obtain the advantage of her French income not being taxed in Germany.

64 It must be observed in the first place that it is true that the preservation of the allocation of powers 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 (judgments of 28 February 2013, *Beker and Beker*, C?168/11, EU:C:2013:117, paragraph 56, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 68).

65 Such a justification may be sanctioned, in particular, where the tax regime at issue is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory (see, to that effect, judgments of 29 March 2007, *Rewe Zentralfinanz*, C?347/04, EU:C:2007:194, paragraph 42; of 18 July 2007, *Oy AA*, C?231/05, EU:C:2007:439, paragraph 54; of 21 January 2010, *SGI*, C?311/08, EU:C:2010:26, paragraph 60; of 28 February 2013, *Beker and Beker*, C?168/11, EU:C:2013:117, paragraph 57, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 75).

66 In accordance with settled case-law, although 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, that allocation of fiscal jurisdiction does not allow them to apply measures contrary to the freedoms of movement guaranteed by the 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 EU rules (see, to that effect, judgments of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraphs 93 and 94; of 19 January 2006, *Bouanich*, C?265/04, EU:C:2006:51, paragraphs 49 and 50, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraphs 41 and 42).

67 In the present case, the issue of the allocation of powers to impose taxes between the

French Republic and the Federal Republic of Germany was dealt with in the Franco-German Convention, according to which, first of all, salaries, wages and similar remuneration, paid by one of the Contracting States, by a Land or by a legal person of that State or Land governed by public law to natural persons resident in the other State in consideration for present or past administrative services is to be taxable only in the first State. Next, that convention provides that income originating in France which, by virtue of that convention, is taxable in that Member State, received by residents of the Federal Republic of Germany, is to be excluded from the German basis of assessment, without that rule limiting the right of the Federal Republic of Germany to take into account, when determining the rate of its taxes, the income thus excluded. Finally, the convention does not impose an obligation for the State which is the source of the income to take full account of the personal and family circumstances of taxpayers carrying on their economic activity in that Member State and residing in the other Member State.

68 The Federal Republic of Germany has therefore freely accepted the allocation of powers of taxation that results from the terms of the Franco-German Convention, by waiving the right to tax wages, such as those received by Mrs Bechtel, without being discharged, under the convention, from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory and carrying on their economic activity in France.

69 That mechanism for allocating powers of taxation cannot be relied upon in order to justify the refusal to grant a resident taxpayer the advantages arising from his or her personal and family circumstances being taken into account.

70 First, the fact that the Federal Republic of Germany allows the deduction of pension and health insurance contributions, such as those at issue in the main proceedings, does not undermine the allocation of powers of taxation, as agreed in the Franco-German Convention. By allowing the deduction of those contributions, the Federal Republic of Germany does not surrender part of its tax jurisdiction to other Member States and that does not affect its power to tax activities carried out on its territory.

71 Secondly, the Court has already held that a justification based on a balanced allocation of powers to impose taxes 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, judgments of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraphs 99 and 100; of 28 February 2013, *Beker and Beker*, C?168/11, EU:C:2013:117, paragraph 56, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 69).

72 As was pointed out in paragraphs 67 and 68 above, by virtue of the Franco-German Convention, the Federal Republic of Germany is not discharged from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory.

73 As regards the possibility of the Member State of employment unilaterally taking into account Mrs Bechtel’s personal and family circumstances by allowing her to deduct, for tax purposes, the insurance contributions at issue in the main proceedings, it should be noted that the request for a preliminary ruling contains no information that enables the Court to determine whether those circumstances were in fact taken into account or whether it would even be possible to do so.

74 In any event, the tax legislation at issue in the main proceedings does not establish any correlation between the tax advantages granted to residents of the Member State concerned and the tax advantages for which those residents may qualify in their Member State of employment (see, by analogy, judgment of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 73).

75 In the second place, as regards the need to maintain the cohesion of a tax system, although such an overriding reason of general interest can justify a restriction on the exercise of fundamental freedoms guaranteed by the Treaty, in order for an argument based on such a justification to succeed, the Court requires that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the legislation at issue (see, to that effect, judgment of 1 July 2010, *Dijkman and Dijkman-Lavaleije*, C?233/09, EU:C:2010:397, paragraphs 54 and 55 and the case-law cited, and of 26 May 2016, *Kohll and Kohll-Schlesser*, C?300/15, EU:C:2016:361, paragraph 60).

76 In the present case, the German Government’s argument seeks to demonstrate, first, that the aim of the refusal to deduct special expenses is to ensure that the increased tax rate in the spouses’ maintenance of progressivity is not corrected by reducing taxable income, and secondly, that the advantage resulting from the deduction of the contributions would be offset by the taxation of income which has a direct link with those contributions.

77 It is important to note that there is no direct link, for the purposes of the case-law cited in paragraph 75 above, between, on the one hand, the method of exemption with maintenance of progressivity, by which the State of residence forgoes taxing income received in another Member State, but takes that income into account for the purpose of determining the tax rate applicable to the taxable income, and on the other, the refusal to take into account contributions which have a direct link with the exempt income. The effectiveness of the progressivity of the income tax in the Member State of residence, sought by the method of exemption with maintenance of progressivity, is not conditional upon the consideration given to the personal and family circumstances of the taxpayer being limited to expenses connected with income taxed in that Member State (see, by analogy, judgment of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraph 109).

78 In addition, since the Federal Republic of Germany agreed in the Franco-German Convention that income received in France is solely taxed in that Member State, it cannot assert that the disadvantage arising from the refusal to deduct contributions such as those at issue in the main proceedings is offset by the fact that that income is not taxed in Germany. Such an argument would, in point of fact, amount to undermining the allocation of powers of taxation freely agreed by the Federal Republic of Germany in the Franco-German Convention.

79 The refusal to grant a resident taxpayer the advantages arising from the fact that her personal and family circumstances are taken into account in the form of deductions of additional pension and health insurance contributions, such as those at issue in the main proceedings, as special expenses cannot therefore be justified either for reasons connected with the balanced allocation of powers of taxation or the maintenance of fiscal cohesion.

80 In the light of the foregoing considerations, the answer to the questions referred is that Article 45 TFEU must be interpreted to the effect that it precludes legislation of a Member State, such as that at issue in the main proceedings, under which a taxpayer residing in that Member State and working for the public administration of another Member State may not deduct from the income tax basis of assessment in her Member State of residence the pension and health insurance contributions deducted from her wages in the Member State of employment, in contrast to comparable contributions paid to the social security fund of her Member State of residence, where, under the Convention for the avoidance of double taxation between the two Member States, the wages must not be taxed in the worker's Member State of residence and merely increase the tax rate to be applied to other income.

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 (Tenth Chamber) hereby rules:

Article 45 TFEU must be interpreted to the effect that it precludes legislation of a Member State, such as that at issue in the main proceedings, under which a taxpayer residing in that Member State and working for the public administration of another Member State may not deduct from the income tax basis of assessment in her Member State of residence the pension and health insurance contributions deducted from her wages in the Member State of employment, in contrast to comparable contributions paid to the social security fund of her Member State of residence, where, under the Convention for the avoidance of double taxation between the two Member States, the wages must not be taxed in the worker's Member State of residence and merely increase the tax rate to be applied to other income.

[Signatures]

* Language of the case: German.