Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2019 (*)

(Reference for a preliminary ruling — Agreement between the European Community and the Swiss Confederation on the free movement of persons — Transfer by a natural person of his domicile from a Member State to Switzerland — Taxation of unrealised capital gains with respect to shares in a company — Direct taxation — Freedom of movement of self-employed persons — Equal treatment)

In Case C?581/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany), made by decision of 14 June 2017, received at the Court on 4 October 2017, in the proceedings

Martin Wächtler

v

Finanzamt Konstanz,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Prechal, M. Vilaras, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, M. Ileši?, J. Malenovský, M. Safjan, D. Šváby and C.G. Fernlund (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2018,

after considering the observations submitted on behalf of:

– Mr Wächtler, by R. Bock, Rechtsanwalt,

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

– the Spanish Government, by S. Jiménez García and V. Ester Casas, acting as Agents,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the European Commission, by M. Wasmeier, B.-R. Killmann, M. Šimerdová and N. Gossement, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6; 'the AFMP').

2 The request has been made in proceedings between Mr Martin Wächtler and the Finanzamt Konstanz (the tax authority of Konstanz, Germany) concerning the decision of that authority to tax, on his transferring his domicile from Germany to Switzerland, the unrealised capital gains with respect to shares held by him in a company established in Switzerland of which he is also the managing director.

Legal context

The AFMP

3 The European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, signed, on 21 June 1999, seven agreements, one of which was the AFMP. By Decision 2002/309/EC, Euratom, of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1, and corrigendum OJ 2015 L 210, p. 38), those seven agreements were approved on behalf of the European Community and entered into force on 1 June 2002.

4 According to the preamble of the AFMP, the Contracting Parties are '[r]esolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

5 Article 1 of that agreement states:

'The objective of this Agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is:

(a) to accord a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties;

...

(c) to accord a right of entry into, and residence in, the territory of the Contracting Parties to persons without an economic activity in the host country;

(d) to accord the same living, employment and working conditions as those accorded to nationals.'

6 Article 2 of that agreement, headed 'Non-discrimination', provides:

'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

7 Article 4 of the AFMP, headed 'Right of residence and access to an economic activity', is

worded as follows:

‘The right of residence and access to an economic activity shall be guaranteed … in accordance with the provisions of Annex I.’

8 Article 6 of the AFMP states:

‘The right of residence in the territory of a Contracting Party shall be guaranteed to persons not pursuing an economic activity in accordance with the provisions of Annex I relating to non-active people.’

9 Article 7 of that agreement, headed ‘Other rights’, provides:

‘The Contracting Parties shall make provision, in accordance with Annex I, for the following rights in relation to the free movement of persons:

(a) the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions;

(b) the right to occupational and geographical mobility which enables nationals of the Contracting Parties to move freely within the territory of the host state and to pursue the occupation of their choice;

(c) the right to stay in the territory of a Contracting Party after the end of an economic activity;

...’

10 In accordance with Article 15 of the AFMP, the annexes and protocols to the Agreement are to form an integral part of it.

11 Article 16 of the AFMP, headed ‘Reference to Community law’, states:

‘1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.

2. Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland’s attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.’

12 Article 21 of the AFMP, headed ‘Relationship to bilateral agreements on double taxation’, states:

‘1. The provisions of bilateral agreements between Switzerland and the Member States of the European Community on double taxation shall be unaffected by the provisions of this Agreement. In particular, the provisions of this Agreement shall not affect the double taxation agreements’ definition of “frontier workers”.

2. No provision of this Agreement may be interpreted in such a way as to prevent the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their

place of residence.

3. No provision of this Agreement shall prevent the Contracting Parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under their national tax legislation or agreements aimed at preventing double taxation between Switzerland, of the one part, and one or more Member States of the European Community, of the other part, or any other tax arrangements.'

13 Annex I to the AFMP concerns the free movement of persons. Article 6(1) of that annex provides:

'An employed person who is a national of a Contracting Party (hereinafter referred to as "employed person") and is employed for a period of one year or more by an employer in the host state shall receive a residence permit which is valid for at least five years from its date of issue. …'

14 Article 7(1) of that annex states:

'An employed frontier worker is a national of a Contracting Party who has his residence in the territory of a Contracting Party and who pursues an activity as an employed person in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week.'

15 Article 9(1) and (2) of Annex I, that article being headed 'Equal treatment', provide:

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

2. An employed person and the members of his family … shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.'

16 Chapter III of Annex I to the AFMP, which concerns self-employed persons, contains Articles 12 to 16 of that annex. Article 12(1), that article being headed 'Rules regarding residence', provides:

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

17 Article 13(1) of that annex, that article being headed 'Self-employed frontier workers', provides:

'A self-employed frontier worker is a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day or at least once a week.'

18 Article 15 of that annex, headed 'Equal treatment', provides:

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

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

The Agreement between the Swiss Confederation and the Federal Republic of Germany

19 Article 1 of the Agreement between the Swiss Confederation and the Federal Republic of Germany to avoid double taxation with respect to income tax and capital taxes, of 11 August 1971 (BGBl. 1972 II, p. 1022), as amended by the Protocol of 27 October 2010 (BGBl. 2011 I, p. 1092) (‘the Agreement between the Swiss Confederation and the Federal Republic of Germany’), provides:

‘This Agreement applies to persons who are residents of one Contracting State or of both Contracting States.’

20 Article 4(1) of the Agreement between the Swiss Confederation and the Federal Republic of Germany provides:

‘For the purposes of this Agreement, the expression “person who is a resident of a Contracting State” means any person who, under the law of that State, is subject to unlimited tax liability in that State.’

21 Article 13 of that Agreement provides:

‘1. Gains accruing from the disposal of immovable property, as defined in Article 6(2), are taxable in the Contracting State where that property is situated.

2. Gains accruing from the disposal of movable property that forms part of the assets of a permanent establishment that an undertaking of a Contracting State has in the other Contracting State, or movable property that is part of fixed facilities available to a person who is a resident of a Contracting State in the other Contracting State for the pursuit of a profession, including such gains as accrue from the complete disposal of the permanent establishment (alone or together with the whole undertaking) or of those fixed facilities, shall be taxable in that other State. ...

3. Gains accruing from the disposal of any property other than that referred to in paragraphs 1 and 2 shall be taxable only in the Contracting State in which the transferor is resident.

...

5. If a Contracting State, on the departure of a natural person who is a resident of that State, taxes the capital gains accruing from a substantial shareholding in a company which is resident in that State, the other Contracting State, when it taxes the gain accruing from a subsequent disposal of the shareholding in accordance with the provisions of paragraph 3, shall, in order to calculate the amount of the gain on disposal, deem the cost of acquisition to be the amount which the first State accepted as the disposal proceeds at the time of departure.’

22 Article 27(1) of that Agreement states:

‘The competent authorities of the Contracting States shall exchange any information that may be reasonably required to apply the provisions of this Agreement or for the administration or

application of domestic legislation relating to taxes of any kind or description that are levied on behalf of the Contracting States or their “Länder”, cantons, districts, municipalities or groups of municipalities, in so far as the taxation imposed is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.’

German law

23 Paragraph 1(1) of the Einkommensteuergesetz (Law on Income tax), in the version applicable to the main proceedings (BGBl. 2009 I, p. 3366: ‘the EStG’), provides:

‘Natural persons who are domiciled or habitually resident in the national territory shall have an unlimited liability to income tax. …’

24 Paragraph 17(1) and (2) of the EStG state:

‘1. A gain from a disposal of shares in a company also constitutes income from a professional activity where the transferor has held, either directly or indirectly, at least a 1% share of the company’s capital within the preceding five years ...

2. The difference, after deduction of the sale costs, between the sale price and the cost of acquisition is considered to be a capital gain within the meaning of subparagraph 1. ...’

25 Paragraph 6 of the Gesetz über die Besteuerung bei Auslandsbeziehungen (Law on foreign transaction tax), of 8 September 1972 (BGBl. 1972 I, p. 1713), in the version applicable to the main proceedings (‘the AStG’), provides:

‘1. In the case of a natural person who has been subject to unlimited tax liability for at least ten years in total under Paragraph 1(1) of the [EStG] and where that person’s unlimited liability ends with the transfer of his domicile or habitual residence, Paragraph 17 of the [EStG] shall be applicable to the shares referred to in the first sentence of Paragraph 17(1) of the [EStG] when the unlimited liability comes to an end, including in the absence of disposal, if the requirements of that provision concerning those shares are also met at that time.

...

4. Subject to [Paragraph 6](5), the income tax due under [Paragraph 6](1) must, upon request, be deferred and paid in instalments at regular intervals over a maximum period of five years from the due date of first payment, subject to the provision of a bank guarantee, in so far as immediate recovery would have consequences which would be difficult for the taxpayer to bear. The deferral shall end if, during the deferral period, the shares are sold or covertly transferred to a company, as provided for in Paragraph 17(1) of the [EStG], or if one of the situations referred to in Paragraph 17(4) of the [EStG] arises ...

5. If the taxpayer in the situation referred to in the first sentence of [Paragraph 6](1) is a national of a Member State … or of another State to which the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3; ‘the EEA Agreement’)] applies, and, after the end of the unlimited tax liability, he is subject to tax in one of those States (host State) comparable to German income tax liability, the tax payable under [Paragraph 6](1) shall be deferred without interest and without the provision of a bank guarantee. This measure is subject to the condition that administrative support and mutual assistance in the recovery of tax between the Federal Republic of Germany and that State are guaranteed. ...

The deferral shall end in the following cases:

1) if the taxpayer or his legal successor within the meaning of the third sentence of subparagraph 1, sells the shares or covertly transfers them to a company, in accordance with the first sentence of Article 17(1) of the [EStG], or if one of the situations referred to in Paragraph 17(4) of the [EStG] arises;

2) if the shares are transferred to a person not subject to unlimited tax liability, who is not subject to tax comparable to unlimited German income tax liability in a Member State … or in a State which is party to the EEA agreement;

3) if the shares are subject to a levy or another transaction which, under national law, means that the going-concern value or market value are taken into account;

4) if the taxpayer or his legal successor within the meaning of the third sentence of subparagraph 1, is no longer subject to tax liability within the meaning of the first sentence because he has transferred his domicile or habitual residence.'

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

26 Mr Wächtler, a German national, has since 1 February 2008 been the managing director of a company incorporated under Swiss law, the nature of his business being in the field of IT consultancy, and he owns 50% of the company's share capital.

27 On 1 March 2011 Mr Wächtler transferred his domicile from Germany to Switzerland. Following that transfer, the Finanzamt Konstanz, pursuant to Paragraph 6 of the AStG and Paragraph 17 of the EStG, levied income tax on the unrealised capital gain with respect to his shareholding in that company.

28 Since Mr Wächtler considered that that taxation, liability for which arises solely because he has transferred his domicile to Switzerland, is contrary to the AFMP, and more specifically to the right of establishment provided for by the AFMP, he brought an action before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany).

29 That court has doubts as to the compatibility of the tax regime at issue with the preamble of the AFMP, with Articles 1, 2, 4, 6, 7, 16 and 21 thereof, and with Article 9 of Annex I thereto, in that it prescribes the taxation of unrealised capital gains with respect to company shares while permitting no deferral of payment of the tax payable in the event of a transfer, by a national of the Member State concerned, of his domicile to Switzerland, whereas, in the event of a transfer, by such a national, of his domicile to a Member State other than the Federal Republic of Germany or to a third State that is a party to the EEA Agreement, that tax regime does permit deferral, without interest and without provision of any guarantee, of payment of such a tax until the actual disposal of the shareholdings concerned, provided that, first, the host State gives to the Federal Republic of Germany assistance and support in tax recovery and, second, the tax payer is subject in that host State to taxation comparable to the German income tax liability.

30 That court states that that deferral, with respect to the second scenario involving transfer of domicile, was introduced in Paragraph 6(5) of the AStG by the national legislature because, if there were no possibility of deferring payment of the tax at issue, the tax regime concerned would be in breach of the freedom of establishment guaranteed by EU law, since a German national who maintains his domicile in the national territory is taxed only at the time when the capital gains with respect to the shares concerned are realised. The compatibility with EU law of the amendment made to that provision in relation to the deferral of recovery was, it is added, confirmed by the judgment of 11 March 2004, *de Lasteyrie du Saillant* (C?9/02, EU:C:2004:138).

31 If the tax regime at issue were to constitute a restriction on the right of establishment within the meaning of the AFMP, the referring court is uncertain whether that restriction can be justified by overriding reasons in the general interest, linked to the preservation of the allocation of powers of taxation between the contracting parties concerned, the effectiveness of fiscal supervision and the need to ensure the effective collection of the tax in order to prevent loss of tax revenue and, if that is the case, whether that restriction is appropriate for attaining the objective pursued and does not go beyond what is necessary in order to attain it.

32 In those circumstances, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the provisions of the [AFMP], in particular the preamble and Articles 1, 2, 4, 6, 7, 16 and 21 thereof and Article 9 of Annex I thereto, be interpreted as precluding the legislation of a Member State which, in order to prevent any loss of the tax base, prescribes the taxation (without deferral) of latent, unrealised capital gains with respect to company shares, where a national of that Member State, initially subject to unlimited tax liability in that Member State, transfers his domicile from that Member State to Switzerland, and not to a Member State ... or to a State to which the EEA Agreement is applicable?’

Consideration of the question referred

33 As stated in paragraph 30 of the present judgment, the possibility of deferring the payment of tax relating to unrealised capital gains with respect to company shares, in the event that a German national transfers his domicile to a Member State other than the Federal Republic of Germany or to a third State that is party to the EEA Agreement, was introduced by the national legislature in order to bring the German tax regime into compliance with EU law on the free movement of persons, since a German national who maintains his domicile in the national territory is taxed on the capital gains with respect to company shares only at the time when those gains are realised.

34 Consequently, the question of the referring court has to be understood as seeking, in essence, to ascertain whether the provisions of the AFMP must be interpreted as precluding a Member State’s tax regime which, in a situation where a natural person, who is a national of that Member State and who pursues an economic activity in the territory of the Swiss Confederation, transfers his domicile from the Member State whose tax regime is at issue to Switzerland, prescribes the collection, at the time of that transfer, of the tax payable on the unrealised capital gains with respect to company shares owned by that person, whereas, in the event that domicile is maintained in that Member State, the collection of the tax takes place only at the time when the capital gains are realised, that is when there is a disposal of the company shares concerned.

35 As a preliminary point, since the AFMP is an international treaty, it must be interpreted, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*

, vol. 1155, p. 331), in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (judgments of 2 March 1999, *Eddline El-Yassini*, C?416/96, EU:C:1999:107, paragraph 47, and of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 94 and the case-law cited). Further, it follows from that provision that a term will be understood to have a special meaning if it is shown that that was the intention of the parties (see, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK*, C?266/16, EU:C:2018:118, paragraph 70).

36 In that context, it is important to note, first, that the AFMP falls within the more general framework of relations between the European Union and the Swiss Confederation. Although the Swiss Confederation does not participate in the European Economic Area and in the European Union's internal market, it is nevertheless linked to the European Union by numerous agreements covering vast fields and prescribing specific rights and obligations, analogous, in some respects, to those laid down by the Treaty. The general objective of those agreements, including the AFMP, is to strengthen the economic ties between the European Union and the Swiss Confederation (judgment of 6 October 2011, *Graf and Engel*, C?506/10, EU:C:2011:643, paragraph 33).

37 However, as the Swiss Confederation has not joined the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot automatically be applied to the interpretation of the AFMP, unless there are express provisions to that effect laid down by that agreement itself (judgment of 15 March 2018, *Picart*, C?355/16, EU:C:2018:184, paragraph 29).

38 As regards, second, the objective of the AFMP and the interpretation of its terms, it is clear from the preamble, Article 1 and Article 16(2) of the AFMP that the aim of that agreement is to secure, for natural persons who are EU nationals or nationals of the Swiss Confederation, the free movement of persons in the territory of those parties based on the rules applying within the European Union, the terms of which must be interpreted in accordance with the relevant case-law of the Court prior to the date of signature of that agreement.

39 As regards case-law after that date, it must be noted that Article 16(2) of the AFMP provides, first, that that case-law must be brought to the attention of the Swiss Confederation and, second, that, in order to ensure that the AFMP works properly, at the request of a Contracting Party, the Joint Committee provided for in Article 14 of the AFMP is to determine the implications of such case-law. That said, even where no determination is made by that committee, as stated by the Advocate General in points 71 and 72 of his Opinion, that case-law should also be taken into account in so far as it does no more than clarify or confirm the principles established in the case-law in existence on the date of signature of the AFMP in relation to concepts of EU law which inform that agreement.

40 Those considerations must guide the Court in examining the scope of the AFMP and its provisions.

41 According to the preamble and Article 1(a) and (c) of the AFMP, the scope of that agreement extends both to natural persons who pursue an economic activity and those who do not do so.

42 It is apparent from the documents before the Court that Mr Wächtler pursues an economic activity, in this instance that of an IT consultant by means of a company established in Switzerland of which he is the managing director.

43 As regards, more particularly, such a person, it is stated in the wording of Article 1(a) of the AFMP that the objective of that agreement is to accord a right of entry, residence, access to work

as an employed person, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties. To that end, Article 4 of the AFMP provides that the right of residence and access to an economic activity is to be guaranteed in accordance with the provisions of Annex I to that agreement.

44 As regards the capacity in which the economic activity concerned is pursued, it is clear from a comparison of Articles 6 and 7 of Annex I to the AFMP with Articles 12 and 13 of that annex that the distinction made between employed persons and self-employed persons is linked to the question of whether the economic activity in question is to be regarded as 'activity as an employed person' or as 'self-employed activity'.

45 In that context, it must be recalled that the concept of an 'employed person' is a concept of EU law (judgment of 19 March 1964, *Unger*, 75/63, EU:C:1964:19, p. 363) which already existed at the date of signature of the AFMP. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which remuneration is received. Conversely, an activity pursued without any relationship of subordination has to be classified as 'self-employed activity' (see, by analogy, judgments of 27 June 1996, *Asscher*, C?107/94, EU:C:1996:251, paragraphs 25 and 26, and of 20 November 2001, *Jany and Others*, C?268/99, EU:C:2001:616, paragraph 34).

46 Since Mr Wächtler pursues his activities as an IT Consultant by means of a company of which he is the managing director and of which he owns 50% of the shares, the relationship of subordination which characterises activity as an employed person is, in this case, absent, as the Advocate General stated in points 38 and 39 of his Opinion. It follows that the economic activity pursued by Mr Wächtler is that of a self-employed person, within the meaning of the AFMP.

47 As regards the scope *ratione personae* of the concept of 'self-employed person', within the meaning of the AFMP, the Court has already stated that that scope is defined in Articles 12 and 13 of Annex I to that agreement (judgment of 15 March 2018, *Picart*, C?355/16, EU:C:2018:184, paragraph 18).

48 It follows from Article 12(1) of that annex that that provision is applicable to a natural person who is a national of a contracting party and who has become established in the territory of another contracting party and pursues a self-employed activity in the territory of that other party (see, to that effect, judgment of 15 March 2018, *Picart*, C?355/16, EU:C:2018:184, paragraphs 22 and 23).

49 Mr Wächtler's situation is that of a national of a contracting party of the AFMP, namely the Federal Republic of Germany, who has become established in the territory of another contracting party, namely the Swiss Confederation, in order there to pursue, by means of a company, his self-employed activity. That situation falls, therefore, within the scope of Article 12 of Annex I to the AFMP.

50 The fact that Mr Wächtler owns 50% of the shares in the company by means of which he pursues the self-employed activity in question cannot call that finding into question. As the Advocate General stated, in essence, in points 43 to 56 of his Opinion, the right of establishment as a self-employed person, within the meaning of the AFMP, extends, with the exception of the provision of services, to any economic or gainful activity of a natural person that can be classified as a 'self-employed' activity. Moreover, the actual exercise of that right presupposes the possibility of choosing the legal form that is appropriate to doing so.

51 As regards whether it is open to a national of a contracting party to assert the rights conferred by the AFMP against his or her State of origin, it must be observed that, in accordance with case-law of the Court which existed prior to the date of signature of that agreement, the right

of establishment, within the meaning of EU law, has the aim not only of ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, but also of preventing restrictions on that right issuing from the Member State of origin of the national concerned (see, to that effect, judgment of 27 September 1988, *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraph 16).

52 Accordingly, in certain circumstances and in the light of the applicable provisions, nationals of a Contracting Party of the AFMP may claim rights under that agreement not only against the State to which they exercise freedom of movement but also against their State of origin (judgment of 15 March 2018, *Picart*, C?355/16, EU:C:2018:184, paragraph 16 and the case-law cited).

53 The free movement of persons guaranteed by the AFMP would be impeded if a national of a Contracting Party were to be placed at a disadvantage in his State of origin solely for having exercised his right of free movement (judgment of 15 December 2011, *Bergström*, C?257/10, EU:C:2011:839, paragraph 28).

54 It follows that the principle of equal treatment, laid down in Article 15(2) of Annex I to the AFMP, read together with Article 9 of that annex, can also be relied on against his State of origin by a self-employed person who falls within the scope of that agreement.

55 Since the principle of equal treatment is a concept of EU law (see, to that effect, judgments of 19 October 1977, *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7, and of 6 October 2011, *Graf and Engel*, C?506/10, EU:C:2011:643, paragraph 26 and the case-law cited) which existed at the date of signature of the AFMP, it is necessary, as follows from paragraphs 38 and 39 of the present judgment, to take into account the principles established by the Court's case-law in relation to equal treatment in order to determine whether there is any discrimination that is prohibited by the AFMP (see, to that effect, judgments of 6 October 2011, *Graf and Engel*, C?506/10, EU:C:2011:643, paragraph 26, and of 21 September 2016, *Radgen*, C?478/15, EU:C:2016:705, paragraph 47).

56 In this case, it is clear that a German national who, like Mr Wächtler, has exercised his right of establishment as a self-employed person under the AFMP suffers a fiscal disadvantage as compared with other German nationals who, like him, pursue a self-employed activity by means of a company in which they own shares, but who, unlike him, maintain their domicile in Germany. That is because the latter have to pay the tax on the capital gains with respect to the shares concerned only when those capital gains are realised, that is when there is a disposal of those shares, whereas a national such as Mr Wächtler is obliged to pay the tax at issue, at the time when he transfers his domicile to Switzerland, on the unrealised capital gains with respect to such shares, and has no right to a deferral of payment until the disposal of those shares.

57 That difference in treatment, which constitutes a tax-flow disadvantage for a German national such as Mr Wächtler, is capable of deterring him from making actual use of the right of establishment he derives from the AFMP. It follows that the tax regime at issue in the main proceedings may impede the right of establishment as a self-employed person guaranteed by that agreement.

58 It must, however, be noted that the effect of Article 21(2) of the AFMP is that taxpayers whose situations are not comparable, especially as regards their place of residence, may be treated differently for tax purposes (judgment of 21 September 2016, *Radgen*, C?478/15, EU:C:2016:705, paragraph 45).

59 In that regard, it must be stated that, under Paragraph 6 of the AStG, the Federal Republic of Germany decided to exercise its powers to tax capital gains, with respect to shares owned by a

German national, which have accrued during the period when that national, being domiciled in Germany, is subject to an unlimited liability to the German tax, irrespective of the territory where those capital gains accrued.

60 Having regard to the objective of that legislation, which is to tax the capital gains on shares which have accrued within the scope of the tax powers of the Federal Republic of Germany, the situation of a national of a Member State who transfers his domicile from Germany to Switzerland is comparable to that of a national of a Member State who maintains his or her domicile in Germany. In both cases, the power to tax those capital gains falls to the Federal Republic of Germany, that power being linked, pursuant to its national legislation, to the domicile of the national concerned in its territory during the period when those capital gains accrued, irrespective of the place where they arose.

61 The question then arises whether the difference in treatment referred to in paragraphs 56 and 57 of the present judgment can be justified by the overriding reasons in the general interest described by the referring court and set out in paragraph 31 of the present judgment, namely the preservation of the allocation of powers of taxation between the parties to the AFMP concerned, the effectiveness of fiscal supervision and the need to guarantee the effective collection of the tax in order to prevent the loss of tax revenue.

62 In that regard, Article 21(3) of the AFMP provides that no provision of that agreement is to prevent the contracting parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under the national tax legislation of a contracting party or agreements aimed at preventing double taxation between Switzerland, of the one part, and one or more Member States, of the other part, or any other tax arrangements.

63 However, such measures, which correspond, according to the Court’s case-law in the context of free movement of persons within the European Union, to overriding reasons in the general interest (see, inter alia, judgments of 15 May 1997, *Futura Participations and Singer*, C?250/95, EU:C:1997:239, paragraph 31 and the case-law cited; of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C?290/04, EU:C:2006:630, paragraph 36, and of 11 December 2014, *Commission* v *Spain*, C?678/11, EU:C:2014:2434, paragraphs 45 and 46), must, in any event, have due regard for the principle of proportionality, that is, they must be appropriate for attaining those objectives and must not go beyond what is necessary in order to attain them.

64 In this case, it must be stated that, while the determination of the amount of tax at issue at the time of the transfer of domicile to Switzerland is a measure that is appropriate for attaining the objective relating to the preservation of the allocation of powers of taxation between that State and the Federal Republic of Germany, that objective cannot, however, justify it being impossible to defer payment of that tax. Such a deferral does not mean that the Federal Republic of Germany is surrendering, to the Swiss Confederation, its powers to tax the capital gains that have accrued during the period when the owner of the shares concerned had an unlimited liability to pay the German tax.

65 As regards the objective relating to the effectiveness of fiscal supervision, the Agreement between the Swiss Confederation and the Federal Republic of Germany makes provision for the possibility of an exchange of information on tax matters between the contracting parties, so that the Federal Republic of Germany could obtain from the competent Swiss authorities the information needed in relation to a disposal, by the national concerned who has earlier transferred his or her domicile to Switzerland, of the shares in which the unrealised capital gains at issue have arisen. Consequently, a denial of the possibility of deferring payment of the tax at issue in the main proceedings is a measure which, in any event, goes beyond what is necessary in order to achieve

that objective.

66 As regards the objective relating to the need to guarantee the effective collection of the tax in order to prevent the loss of tax revenue, it is clear that the immediate collection of the tax at issue at the time when the taxpayer's domicile is transferred may, as a general rule, be justified by the need to ensure the effective collection of tax liabilities. However, as the Advocate General stated in points 103 to 105 of his Opinion, that measure goes beyond what is necessary in order to achieve that objective and must therefore be considered to be disproportionate. In a situation where there is a risk of non-recovery of the tax payable, particularly where there is no mutual assistance mechanism for the recovery of tax debts, deferral of collection of that tax may be subject to an obligation to provide a guarantee (see, by analogy, judgments of 29 November 2011, *National Grid Indus*, C?371/10, EU:C:2011:785, paragraphs 73 and 74, and of 23 January 2014, *DMC*, C?164/12, EU:C:2014:20, paragraphs 65 to 67).

67 In those circumstances, it must be concluded that the tax regime at issue in the main proceedings constitutes an unjustified restriction on the right of establishment provided for by the AFMP.

68 That conclusion is not called into question by the fact that, in a situation where the immediate collection of the tax payable would have consequences that would be difficult for the taxpayer to bear, that tax regime provides for the possibility of payment of that tax in instalments. Leaving aside the fact that the instalment-payment measure is possible only in that specific situation, it is incapable of eliminating, in such a situation, the cash-flow disadvantage inherent in the obligation on the taxpayer to pay, at the time of the transfer of his domicile to Switzerland, a proportion of the tax payable on the unrealised capital gains with respect to the shares concerned. Moreover, that measure remains more onerous, for the taxpayer, than a measure that permits the deferral, until the disposal of those shares, of payment of the tax payable.

69 In the light of all the foregoing, the answer to the question referred is that the provisions of the AFMP must be interpreted as precluding a tax regime of a Member State which, in a situation where a natural person who is a national of a Member State and who pursues an economic activity in the territory of the Swiss Confederation transfers his domicile from the Member State whose tax regime is at issue to Switzerland, provides for the collection, at the time of that transfer, of the tax payable on unrealised capital gains with respect to shares owned by that national, whereas, if domicile is retained in that Member State, the collection of the tax takes place only at the time when the capital gains are realised, that is on a disposal of the shares concerned.

Costs

70 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 (Grand Chamber) hereby rules:

The provisions of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, must be interpreted as precluding a tax regime of a Member State which, in a situation where a natural person who is a national of a Member State and who pursues an economic activity in the territory of the Swiss Confederation transfers his domicile from the Member State whose tax regime is at issue to Switzerland, provides for the collection, at the time of that transfer, of the tax payable on unrealised capital gains with respect to shares owned by that national, whereas, if domicile is retained in that Member State, the collection of the tax takes place only at the time when

the capital gains are realised, that is on a disposal of the shares concerned.

[Signatures]

* Language of the case: German.