JUDGMENT OF THE COURT (Fourth Chamber)

10 May 2012 (*)

(Failure of a Member State to fulfil obligations — Freedom of movement for workers — Income tax — Allowance — Retirement pensions — Effect on small pensions — Discrimination between resident and non-resident taxpayers)

In Case C-39/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 22 January 2010,

European Commission, represented by W. Mölls, K. Saaremäel-Stoilov and R. Lyal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Estonia, represented by M. Linntam, acting as Agent,

defendant,

supported by:

Kingdom of Spain, represented by M. Muñoz Pérez and A. Rubio Gonzáles, acting as Agents,

Portuguese Republic, represented by L. Inez Fernandes, acting as Agent,

Kingdom of Sweden, represented by A. Falk, acting as Agent,

United Kingdom of Great Britain and Northern Ireland, represented by S. Ossowski, acting as Agent,

Federal Republic of Germany, represented by J. Möller, C. Blaschke and B. Klein, acting as Agents,

interveners,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2011,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2011,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by failing to provide in the Law on income tax (Tulumaksuseadus) of 15 December 1999 (RT I 1999, 101, 903), as amended by the Law of 26 November 2009 (RT I 2009, 62, 405) ('the Law on income tax'), for the application of the personal allowance to non-residents whose total income is so modest that they would benefit from the allowance if they were residents, the Republic of Estonia has failed to fulfil its obligations under Article 45 TFEU and Article 28 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, 'the EEA Agreement').

Legal context

Recommendation 94/79/EC

2 According to the third, fourth and sixth recitals in the preamble to Commission Recommendation 94/79/EC of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJ 1994 L 39, p. 22):

'… steps should be taken to ensure that free movement of persons is fully guaranteed in the interests of the proper functioning of the internal market; … it is necessary to bring to the notice of the Member States the provisions which, in the Commission's view, are likely to guarantee that non-residents enjoy the same tax treatment as residents;

… this initiative does not affect the Commission's conduct of policy in the field of infringement procedures to ensure that the fundamental principles of the [EC] Treaty are respected;

… the principle of equality of treatment stemming from Articles [45 TFEU] and [49 TFEU] requires that persons receiving … income … should not, where the preponderant part of their income is received in the country of activity, be deprived of the tax reliefs and deductions enjoyed by residents'.

3 As Article 1(1) of that recommendation states, it concerns a number of items of income, including pensions.

4 Article 2(1) and the first subparagraph of Article 2(2) of the recommendation read as follows:

'1. Member States do not subject the items of income specified in Article 1(1), in the Member State of taxation, to any heavier taxation than if the taxpayer, his spouse and his children were resident in that Member State.

2. Application of the provisions of paragraph 1 shall be subject to the condition that the items of income specified in Article 1(1) which are taxable in the Member State in which the natural person is not resident constitute at least 75% of that person's total taxable income during the tax year.'

The Agreement between the Republic of Finland and the Republic of Estonia for the avoidance of double taxation

5 Article 18(2)(a) of the Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital concluded in Helsinki on 23 March 1993 between the Republic of Finland and the Republic of Estonia ('the double taxation agreement')

provides:

‘Pensions paid and other benefits, whether periodic or lump-sum compensation, granted under the social security legislation of a Contracting State or under any public scheme organised by a Contracting State for social welfare purposes shall be taxable only in that State.’

The Law on income tax

6 Paragraph 1(1) of the Law on income tax provides:

‘Income tax shall be charged on the taxpayer’s income, less the allowances permitted by the law.’

7 Under Paragraph 2(1) of the Law on income tax, the tax:

‘is to be paid by natural persons and non-resident legal persons who receive taxable income’.

8 Under Paragraph 12(1) of that law:

‘Income tax shall be charged on income received by a resident natural person from all sources of income in Estonia and outside Estonia during the tax period …’

9 In accordance with Paragraphs 19(2) and 29(9) of that law, income tax is also charged on pensions, and Paragraph 41(6) provides that the tax is to be deducted at source.

10 Paragraph 23 of the law provides:

‘A tax-free amount of EEK 27 000 is deducted from the income of a resident natural person during a tax period.’

11 Paragraph 23^2 of the law further provides for a supplementary tax allowance for pensions. In accordance with that provision:

‘From the income of a resident natural person receiving a pension payable under the law by a contracting State, a compulsory capitalisation pension provided for by the legislation of that State, or a pension deriving from a social security agreement, there is additionally deducted a tax-free amount equivalent to the sum of those pensions, but not more that EEK 36 000 in a tax period.’

12 As regards pensions received by residents from the Republic of Estonia, Paragraph $42(1^1)$ of the law provides:

‘From a pension payable under the law by the Estonian State to a resident natural person, and from a compulsory capitalisation pension provided for by the Law on capitalisation pensions, there is deducted, before calculation of the tax to be deducted at source, an additional tax-free amount equivalent to that pension (Paragraph 23^2), but in each calendar month not more in total than 1/12 of the sum laid down in Paragraph 23^2.’

13 As regards income received by non-residents, Paragraph 28^3 of the law provides:

‘A natural person resident in another Member State of the European Union who has received at least 75% of his taxable income in Estonia during a tax period and submits a resident natural person’s declaration of income may also make the deductions laid down in this chapter from his income taxable in Estonia. Taxable income is understood to mean income before deductions are made in accordance with the legislation of that State.’

Pre-litigation procedure

14 A person of Estonian nationality residing in Finland ('the complainant') made a complaint to the Commission concerning the calculation of income tax applied in Estonia to the retirement pension paid to that person in that Member State. The complainant challenged the refusal of the Estonian authorities to apply the tax allowance threshold and the supplementary tax allowance threshold laid down by the Law on income tax for taxpayers resident in Estonia.

15 According to the Commission's application, the complainant, after reaching retirement age in Estonia, moved to Finland, and worked and acquired the right to a pension there. The complainant thus receives two retirement pensions, one in Estonia and one in Finland, of almost the same amount. The pension received in Estonia is subject to income tax, whereas in Finland, on account of the very low level of the complainant's total income, there is no liability to tax. The aggregate amount of the two pensions, moreover, is only slightly above the allowance threshold laid down in Paragraph 23^2 of the Law on income tax.

16 Having regard to those factors, the Commission took the view that under Estonian law the tax burden on non-residents in a similar situation to that of the complainant is greater than it would be if they received all their income in Estonia alone.

17 On 4 February 2008 the Commission thus sent the Republic of Estonia a letter of formal notice drawing that Member State's attention to the possible incompatibility with Article 45 TFEU and Article 28 of the EEA Agreement of the provisions of national legislation on the taxation of pensions paid to non-residents.

18 By letter of 9 April 2008, the Republic of Estonia contested the point of view put forward by the Commission. It observed that the Law on income tax enables the allowances it provides for to be applied to non-residents who receive the majority of their income, that is to say, at least 75% of the total, in Estonia. That law thus affords them the same treatment as residents. Where, on the other hand, the amount of income received in Estonia is lower than that percentage, it is for the Member State of residence to ensure that taxpayers not resident in Estonia are taxed appropriately.

19 On 17 October 2008 the Commission sent the Republic of Estonia a reasoned opinion, in which it repeated the arguments set out in its letter of formal notice and invited that Member State to take the necessary measures within two months from receipt of the reasoned opinion.

20 In its reply of 18 December 2008 to the reasoned opinion, the Republic of Estonia expressed its disagreement with the Commission's complaints as regards the incompatibility of the Law on income tax with Article 45 TFEU. It accepted, however, that there were omissions in that law in relation to its obligations under Article 28 of the EEA Agreement, and stated that it was prepared to extend the scope of Paragraph 28^3 of the law to cover also nationals of the Member States of the European Economic Area.

21 Since it was not convinced by the arguments put forward by the Republic of Estonia, the Commission decided to bring the present action.

22 By order of the President of the Court of 4 June 2010, the Kingdom of Spain, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Republic of Estonia. By orders of 7 July 2010 and 14 January 2011, the President of the Court granted leave to intervene in support of the form of order sought by the Republic of Estonia to the Federal Republic of Germany and the Kingdom of Sweden respectively. However, the Federal Republic of Germany did not submit

observations.

The action

Admissibility of the action

23 In the first place, in its rejoinder, the Republic of Estonia, supported by the Kingdom of Spain, submits that the action must be declared inadmissible, in that its subject-matter is not clearly and precisely defined and the form of order sought is worded ambiguously. The Commission did not indicate clearly the cases in which the Republic of Estonia should apply the allowance in relation to the income tax of non-residents in order to put an end to the alleged failure to fulfil obligations, since, in its application, it said that the allowance must be granted where the worldwide income of non-residents in receipt of a pension in Estonia is lower than the allowance thresholds laid down in Estonian law for taxpayers resident in that State, while, in its reply, it said that the Republic of Estonia should take account, for the purpose of granting the allowance, of any allowance thresholds laid down in the Member State of residence of the person concerned.

24 On this point, it must be recalled that it follows from Article 38(1)(c) of the Rules of Procedure and the related case-law of the Court that an application must state clearly and precisely the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, so as to enable the defendant to prepare a defence and the Court to rule on the application. It follows that the essential points of law and of fact on which an action is based must be indicated coherently and intelligibly in the application itself and that the heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see, inter alia, judgment of 12 February 2009 in Case C-475/07 *Commission* v *Poland*, paragraph 43, and judgment of 24 March 2011 in Case C-375/10 *Commission* v *Spain*, paragraph 10).

25 Those requirements may be examined by the Court of its own motion (see, inter alia, Case C-195/04 *Commission* v *Finland* [2007] ECR I-3351, paragraphs 21 and 22).

26 The Court has also held that, where an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the full extent of the alleged infringement of European Union law, a condition which must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (see, inter alia, *Commission* v *Poland*, paragraph 44, and *Commission* v *Spain*, paragraph 11).

27 In the present proceedings for failure to fulfil obligations, first, it must be noted that the Commission stated in its application, in particular in point 25, that ‘where the legislation of a Member State lays down a threshold below which the taxpayer is regarded as not having the necessary means to finance public expenditure, there is no reason to distinguish between taxpayers whose income is lower than that threshold according to their residence’. The Commission thus indicated clearly that, in its opinion, it was indeed the allowance threshold laid down by the Law on income tax that the Republic of Estonia had to take into account to establish whether a non-resident in receipt of a retirement pension in Estonia was entitled to the allowance in respect of income tax.

28 Secondly, as regards the Commission’s reference to the allowance thresholds in the Member State of residence, it must be observed that that was in the context of an examination by the Commission of the line of case-law deriving from Case C-279/93 *Schumacker* [1995] ECR I-225, from which examination it concluded precisely that, where the taxpayer’s total income is so modest that he is not subject to any tax in the Member State of residence, he is in a similar situation to that of a

resident in the Member State in which the income in question is received. That State should therefore ‘apply its own rules on tax allowances which define the extent to which taxpayers are in a position to pay taxes intended to cover the needs of the country’.

29 In any event, there is nothing in the case-file to warrant the conclusion that the application did not enable the Republic of Estonia to present its defence or that the Court is unable to determine whether there has been a failure to fulfil obligations.

30 The plea of inadmissibility raised by the Republic of Estonia is therefore unfounded and must be rejected.

31 In the second place, as the plea of inadmissibility raised by the Kingdom of Spain and the Portuguese Republic largely coincides with the plea in defence based on Recommendation 94/79 put forward by the Republic of Estonia, the Court finds it appropriate to consider it, if need be, together with the substance of the case.

32 In the third place, it must be noted that, according to the wording of the form of order sought in the application, the Commission asks the Court to declare that, by failing to provide in the Law on income tax for the application of the allowance to non-residents whose total income is so modest that they would benefit from the allowance if they were residents, the Republic of Estonia has failed to fulfil its obligations under Article 45 TFEU and Article 28 of the EEA Agreement. That form of order therefore appears to refer to the national legislation in so far as it concerns all income subject to that law.

33 However, it is apparent from the wording of the Commission’s pleadings that, in its arguments adduced in support of the complaints made against the Republic of Estonia, it refers to the tax treatment only of pensioners in the same situation as the complainant. Furthermore, at the hearing, the Commission explained that its claim for a declaration of a failure to fulfil obligations concerned only the pensions of non-residents.

34 Consequently, the present action for failure to fulfil obligations must be regarded as relating solely to the application of the rules of the Law on income tax to retirement pensions paid to non-residents in a situation such as that of the complainant.

Substance

Arguments of the parties

35 In its application the Commission submits essentially that, by excluding non-resident pensioners from the benefit of the allowances provided for by the Law on income tax where they receive less than 75% of their income in Estonia, that law places taxpayers, because — like the complainant — they have exercised their right of freedom of movement for workers, in a less favourable situation than if they had not made use of that right, even though, in view of the modest amount of their pensions, they are in a comparable situation to residents with income at a similar level. That law therefore constitutes an obstacle to freedom of movement for persons as enshrined in Article 45 TFEU and Article 28 of the EEA Agreement.

36 It follows from *Schumacker*, as confirmed by Case C-169/03 *Wallentin* [2004] ECR I-6443, that persons who receive only a small part of their income in the Member State of residence are, from the point of view of their tax treatment, in a comparable position to persons who reside in the Member State in which they receive their income. Where a person’s income is subject to little or no tax in his Member State of residence, that State cannot ensure that the tax paid on income received

in another Member State is deducted from the taxable amount. In those circumstances, in the Commission's view, it is for the Member State of origin of the income to apply to that income its own tax rules, in particular the benefit of tax allowances.

37 Consequently, as the Court held in Case C-391/97 *Gschwind* [1999] ECR I-5451 and *Wallentin*, where a Member State grants an allowance for income below certain amounts in order to ensure taxpayers a minimum subsistence amount, that benefit should also be granted to non-residents, since it is granted in accordance with the personal situation of the taxpayer.

38 The Republic of Estonia, supported by all the interveners, replies that the difference in treatment between residents and non-residents laid down by the Law on income tax does not constitute a restriction of freedom of movement for persons, since it does not give rise to discrimination between persons in comparable situations.

39 It observes in this respect that it follows from *Schumacker* that the situation of residents and that of non-residents are to be regarded as comparable only where the non-residents receive the most substantial part of their income not in the Member State of residence but in another Member State. It is only in that case that the latter State cannot apply to non-residents a different tax treatment from that applied to residents.

40 Thus, in order to ensure equal treatment of residents and non-residents in a comparable situation, the Law on income tax applies the allowances in question to non-residents where they receive 75% of their worldwide income in Estonia. The calculation of taxable income is based on the law of the Member State of residence of the person concerned, and in order to determine the proportion received in Estonia the non-resident is obliged to submit a certificate from the tax authorities of his Member State of residence.

41 Moreover, according to the Republic of Estonia, by bringing the present action the Commission failed to comply with Recommendation 94/79, in which it stated that equal tax treatment of residents and non-residents is mandatory only if non-residents receive at least 75% of the income received during the tax year in question in the Member State of taxation.

42 With respect more particularly to the situation of the complainant, the Kingdom of Spain and the Portuguese Republic further observe that the Member State of residence, namely the Republic of Finland, took into account the entire income received by the taxpayer in question both in that Member State and in another Member State and did not tax it, because the total amount of income did not exceed the tax-free minimum income. Reasoning *a contrario*, they point out that, if the Member State of residence had fixed a lower tax-free minimum income, that taxpayer's income could have been subject to tax, in which case the amount of tax paid in Estonia would have been deducted. The Law on income tax is not therefore contrary to freedom of movement for workers.

43 The United Kingdom adds that the Commission's proposed solution for avoiding a non-resident in Estonia receiving a greater social benefit than a resident, namely that the authorities of that Member State should take the taxpayer's worldwide income into consideration for the purpose of applying the allowance, is not correct. In accordance with the double taxation agreement, it is not possible to subject income received in Finland to tax in Estonia. The Republic of Estonia is not therefore in a position to calculate the worldwide income of the taxpayer concerned, whereas the Republic of Finland can do so, in view of the fact that the taxpayer resides in Finland and the Finnish authorities have power to obtain information and documents from that taxpayer. The Commission's solution would have the result that the Republic of Estonia would have to apply its basic non-taxable band only to the income received in Estonia, and the non-resident would benefit from his personal and family situation being taken into account both in Estonia and in Finland.

44 On those points, the Commission observes that, contrary to the submissions of the defendant and the interveners, the Court held in *Schumacker* that, where the taxpayer does not receive any significant income in the Member State of residence, the Member State in which he obtains his income must grant him the same advantages as those granted to residents who receive income only in that State. The Court thus accepted that, although in normal circumstances the Member State in which income is received may leave it to the Member State of residence to ensure a level of tax that is appropriate to the taxpayer's means, the Member State in which that income is received is required for its part to take account of the personal situation of the taxpayer where the Member State of residence is unable to do so. Similarly, where a taxpayer's income is subject to very little tax or no tax at all in his Member State of residence, that State cannot ensure that the tax paid on the income received in another Member State is deducted from the taxable amount.

45 As regards the method of calculating the income of the non-resident, the Commission emphasises that the Republic of Estonia is entitled to take the taxpayer's worldwide income into account in order to calculate the tax, if any, to which he is liable in Estonia. If the taxpayer's worldwide income is lower than the tax threshold applicable in Estonia, he should not be subject to any tax in Estonia. If, on the other hand, his worldwide income exceeds the threshold applicable in Estonia, he could be subject to income tax. That does not involve taxation of the income received in Member States other than the Republic of Estonia, but amounts merely to determining the taxpayer's ability to pay for the purpose of taxing solely the income received in Estonia.

46 As regards the defendant's argument concerning Recommendation 94/79, the Commission asserts that that act is not binding. It cannot be intended to supplement the rules of primary law on freedom of movement for persons, and in any event it does not restrict the Commission's power of assessment. The recommendation merely proposes the adoption of national measures to implement European Union law without encroaching on the correct performance of the obligations deriving from the Treaties. Moreover, since the recommendation was adopted before the judgment in *Schumacker* was delivered, it has in fact lost its raison d'être.

Findings of the Court

– The complaint of a breach of Article 45 TFEU

47 It must be noted, as a preliminary point, that it is settled case-law that, while direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with European Union law (see, inter alia, *Schumacker*, paragraph 21; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29; and Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 28). Tax rules of national law must therefore be adopted consistently with the freedoms guaranteed by the Treaties, in particular the freedom of movement for workers as conferred by Article 45 TFEU.

48 It is incompatible in principle with the rules on freedom of movement for a worker who has made use of that right to be the subject of less favourable treatment in the Member State of which he is a national than he would receive if he had not made use of the opportunities offered by those rules. However, it must be remembered that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, *Schumacker*, paragraph 30; *Gschwind*, paragraph 21; and Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 18).

49 As far as direct taxes are concerned, residents and non-residents are generally not in comparable situations, since the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and a

non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which is generally the place of his usual residence (see, inter alia, *Schumacker*, paragraphs 31 and 32, and *Gschwind*, paragraph 22).

50 The Court held in *Schumacker*, paragraph 34, that the fact that a Member State does not grant to a non-resident certain tax advantages which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and non-residents from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (see *Gschwind*, paragraph 23).

51 There could be discrimination within the meaning of the Treaty between residents and non-residents only if, notwithstanding their residence in different Member States, it were established that, having regard to the purpose and content of the national provisions in question, the two categories of taxpayers are in a comparable situation (see *Gschwind*, paragraph 26).

52 That is the case where a non-resident who has no significant income in his Member State of residence and gains the main part of his taxable income from an activity carried on in the Member State of employment is in a comparable situation to that of residents of the latter State because the Member State of residence is not in a position to grant him the advantages resulting from the taking into account of his personal and family circumstances. Consequently, as regards his tax treatment, he must be treated as resident in the Member State of employment, and that State must grant him the tax advantages it allows to residents (see, inter alia, *Schumacker*, paragraphs 36 and 37, and *Gschwind*, paragraph 27).

53 The Court has also held that, in a situation in which there is no taxable income in the Member State of residence under the tax legislation of that State (see, to that effect, *Wallentin*, paragraph 18), discrimination could arise if the personal and family circumstances of a person such as the complainant were taken into account neither in the Member State of residence nor in the Member State of employment (see, to that effect, *Wallentin*, paragraph 17).

54 Thus, where nearly 50% of the total income of the person concerned is received in his Member State of residence, that State should in principle be able to take into account his ability to pay tax and his personal and family circumstances in accordance with the rules laid down by that State's legislation (see *Gschwind*, paragraph 29).

55 However, in a case such as that of the complainant, who because of the modest amount of worldwide income is not taxable in the Member State of residence, under that State's tax legislation, that State is not in a position to take into account the ability to pay tax and the personal and family circumstances of the person concerned, in particular the consequences for that person of taxation of the income received in another Member State.

56 In those circumstances, the refusal of the Member State in which the income in question is received to grant an allowance provided for under its tax legislation penalises non-resident taxpayers such as the complainant simply because they have exercised the freedoms of movement guaranteed by the FEU Treaty.

57 The difference of treatment resulting from such legislation could be justified only if it were based on objective considerations proportionate to the legitimate aim of the national provisions (Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 32). In this respect, although the Republic of Estonia has argued that the condition in question is intended to avoid non-resident taxpayers accumulating allowances in both the Member States concerned, it must be stated that, in a case such

as that of the complainant, there cannot be any unjustified accumulation of advantages.

58 Consequently, to the extent set out above, the general nature of the condition laid down in Paragraph 28^3 of the Law on income tax, which takes no account of the personal and family circumstances of the taxpayers concerned, is liable to penalise persons such as the complainant who have made use of the opportunities offered by the rules on freedom of movement for workers, and is therefore incompatible with the requirements of the Treaties as they follow from Article 45 TFEU.

59 The complaint of a breach of Article 45 TFEU must therefore be regarded as well founded.

60 According to the Republic of Estonia, however, Recommendation 94/79, by virtue of its content and nature, precludes a finding of the alleged failure to fulfil obligations.

61 It is true that in Article 2(2) of that recommendation the Commission said that the Member States should not subject the income of non-resident natural persons to heavier taxation than the income of residents, where the income taxable in the Member State in which the natural person is not resident constitutes at least 75% of that person's total taxable income during the tax year.

62 The Republic of Estonia submits that, in the opposite case, it is entitled to treat residents and non-residents differently.

63 It should be recalled, however, that in accordance with the last subparagraph of Article 288 TFEU recommendations are among the acts of the European Union institutions that have no binding force. Furthermore, as the Advocate General observes in point 60 of his Opinion, the procedure for a declaration of failure to fulfil obligations is based on the objective finding that a Member State has failed to fulfil its obligations under European Union law, so that the principle of the protection of legitimate expectations cannot be relied on by the Republic of Estonia in the present case in order to preclude an objective finding of a failure on its part to fulfil its obligations under the Treaty (see, to that effect, Case C-562/07 *Commission* v *Spain* [2009] ECR I-9553, paragraph 18).

64 It should also be noted that the fourth recital in the preamble to Recommendation 94/79 states that it does not affect the Commission's conduct of policy in the field of infringement procedures to ensure that the fundamental principles of the Treaty are respected.

65 In those circumstances, Recommendation 94/79 does not preclude a finding of a failure to fulfil obligations under Article 45 TFEU. There is therefore no need for the Court to address the question whether the Kingdom of Spain and the Portuguese Republic were correct, in their interventions, in raising a plea of inadmissibility against the Commission's application based on the adoption of that recommendation.

– The complaint of a breach of Article 28 of the EEA Agreement

66 Although in its defence the Republic of Estonia used the arguments relating to the complaint based on Article 45 TFEU in order to contest also the complaint relating to Article 28 of the EEA Agreement, it acknowledged the need to supplement Paragraph 28^3 of the Law on income tax 'to extend its scope to cover also nationals of the Member States of the European Economic Area'.

67 It must be pointed out that the Estonian legislation does not provide for any possibility of granting the tax advantage at issue to persons drawing a pension in Estonia who reside in one of the non-member countries that are members of the EEA Agreement. In so far as the requirements of Article 28 of the EEA Agreement have the same legal effect as the substantially identical provisions of Article 45 TFEU, the considerations set out above may be applied *mutatis mutandis* to Article 28 (see, to that effect, Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 32).

68 It follows from all the foregoing that, by excluding non-resident pensioners from benefiting from the allowances laid down by the Law on income tax where, because of the modest amount of their pensions, they are not taxable in the Member State of residence under the tax legislation of that State, the Republic of Estonia has failed to fulfil its obligations under Article 45 TFEU and Article 28 of the EEA Agreement.

Costs

69 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Estonia has been unsuccessful, it must be ordered to pay the costs.

70 Under Article 69(4) of the Rules of Procedure, the Kingdom of Spain, the Portuguese Republic, the Kingdom of Sweden, the United Kingdom and the Federal Republic of Germany must bear their own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by excluding non-resident pensioners from benefiting from the allowances laid down by the Law on income tax (Tulumaksuseadus) of 15 December 1999, as amended by the Law of 26 November 2009, where, because of the modest amount of their pensions, they are not taxable in the Member State of residence under the tax legislation of that State, the Republic of Estonia has failed to fulfil its obligations under Article 45 TFEU and Article 28 of the Agreement on the European Economic Area of 2 May 1992;**

2. **Orders the Republic of Estonia to pay the costs;**

3. **Orders the Kingdom of Spain, the Portuguese Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany to bear their own costs.**

[Signatures]

---

* Language of the case: Estonian.