OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 20 November 1997 *

1. The Tribunal Administratif, Strasbourg, has referred to the Court, pursuant to Article 177 of the EC Treaty, various questions concerning the interpretation of Articles 6, 48 and 220 of the EC Treaty in order to give judgment in actions brought by Mr and Mrs Gilly against decisions of the Directeur des Services Fiscaux du Bas-Rhin requiring them to pay additional personal income tax for the years 1986, 1988, 1990, 1991, 1992 and 1993.

2. According to the findings of the national court in the order for reference, Mr Gilly is a French national and works as a teacher in the French State education system. His wife, who was originally a German national and acquired French nationality by marriage, is employed as a teacher in the German State education system. The couple reside in France.

3. Mrs Gilly's income tax liability is governed by the Convention of 21 July 1959 between the French Republic and the Federal Republic of Germany for the avoidance of double taxation ('the Franco-German Convention'), [1] by the additional protocols to the Convention dated 9 June 1969 and 28 September 1989 and by Instruction 14-B-2-93 of the French tax authorities containing detailed rules for application.

4. In the present case, Mrs Gilly's income from employment, which was paid by *Land* Baden-Württemberg, was taxed in Germany in accordance with the first sentence of Article 14(1) of the Franco-German Convention because it was public-service remuneration and the recipient was a German national.

5. To avoid double taxation, while Article 20(a) in the version of the Additional Protocol of 1969 was in force, France did not include Mrs Gilly's income in the couple's taxable income but took it into account when calculating the rate of tax applying to income received in France. When this provision was amended by the 1989 Protocol, such income was also taxed in France, although in respect of tax paid abroad there

1 — Convention signed in Paris on 21 July 1959 between the French Republic and the Federal Republic of Germany for the avoidance of double taxation and the establishment of rules for mutual legal and administrative assistance in the field of income and wealth tax and in the field of business tax and land tax.

* Original language: Spanish.

was a right to a tax credit equal to the amount of the French tax on the relevant income.

6. In their actions Mr and Mrs Gilly contend that application of the Franco-German Convention entails in their case excessive, unjustified and discriminatory taxation which is incompatible with Articles 3(c), 6, 48, 73d and 220 of the Treaty. They claim that the additional tax assessments by the French tax authorities should be annulled and that Mrs Gilly should be granted the status of a frontier worker for tax purposes. Alternatively, they seek an order that the tax credit granted in France in respect of tax paid abroad should be equal to the amount of the actual tax paid in Germany and, if not, that Mrs Gilly's income in Germany should not be taken into account in calculating the couple's tax in France. Finally, they seek repayment of the tax wrongfully paid.

The questions referred

7. Taking the view that the outcome of the proceedings depended on the interpretation of Articles 6, 48 and 220 of the Treaty, the Tribunal Administratif, Strasbourg, stayed the proceedings and requested the Court to give a preliminary ruling:

(1) on 'whether the principle of freedom of movement for workers, as embodied in the Treaty of Rome and the implementing legislation, is contravened by a tax regime, applicable to frontier workers, of the kind provided for by the Franco-German Convention, in so far as the latter lays down taxation arrangements which are different for people whose remuneration is paid by a public entity as compared with those whose remuneration is paid by private persons and as a result is liable to have an impact on access to posts in the public or private sectors depending on residence in one State or another';

(2) 'as to the compatibility, in view of the Court's interpretation of the Treaty, with the principle of the freedom of movement and the abolition of all discrimination on grounds of nationality of a rule under which a frontier worker receiving remuneration from a State or an agency thereof governed by public law is taxable in that State whereas, if the frontier worker has the nationality of the other State but is not at the same time a national of the first State, his remuneration is taxable in the State where the frontier worker resides';

(3) 'as to the compatibility with Article 7 [now Article 6] [2] of the Treaty of a tax

2 — Amended by Article G(8) of the Treaty on European Union.

provision which lays down for frontier workers employed by persons governed by public law and residing in one of the Member States a tax regime which differs according to whether they are nationals only of that State or have dual nationality';

(4) on 'whether the principle of freedom of movement for workers, as embodied in the Treaty, is contravened by tax rules which are liable to affect the choice made by teachers in the contracting States as to whether to work on a more or less long-term basis in another State having regard to the differences, based on the duration of employment, in the tax regimes of the States in question';

(5) on 'whether the objective of abolishing double taxation laid down in Article 220 of the Treaty must be regarded, in view of the time which the Member States have had to implement it, as now having the status of a directly applicable rule under which double taxation may no longer take place and, secondly, whether the objective of avoiding double taxation assigned to the Member States by Article 220 is contravened by a tax convention under which the tax regime applicable to frontier workers of States party to the convention varies according to their nationality and the public or private nature of the post held and whether a tax credit regime applicable to a household living in one State which does not take into account the exact amount of the tax paid in another State but only a tax credit, which may be lower, meets the objective assigned to the Member States of abolishing double taxation'; and

(6) on 'whether Article 48 must be interpreted as meaning that nationals of a Member State who are frontier workers in another Member State may not, by reason of a tax credit mechanism of the type provided for by the Franco-German Convention, be taxed more heavily than persons whose occupational activity is pursued in their State of residence'.

The contested provisions of the Franco-German Convention

8. Article 13(1) lays down the basic principle that income from employment is taxable only in the contracting State where the personal activity giving rise to the income is carried on. This rule does not apply to what is referred to as 'public service remuneration'.

9. Article 13(5)(a) provides for an exception to the abovementioned rule in that income from employment earned by persons who work in the frontier area of one contracting State and who have their permanent home in the frontier area of the other contracting State to which they normally return each day is taxable only that other State.

10. Article 14(1) sets out the criteria governing the taxation of public-service remuneration. The first sentence lays down the general rule that remuneration paid by one of the contracting States or by a *Land* or by a legal person of that State governed by public law to natural persons resident in the other State in consideration for military or administrative services is taxable only in the first State.

There is also an exception to this rule, set out in the second sentence, which is to the effect that where remuneration is paid to persons having the nationality of the other State without being at the same time nationals of the first State, the remuneration is taxable only in the State where they reside.

11. Article 16 contains a special rule applying to teachers who go from one State to work in the other for a limited period, in which case they remain taxable in the State in which they habitually reside. According to this provision, teachers habitually residing in one of the contracting States who, in the course of a temporary stay not exceeding two years in the other State, receive remuneration for teaching activity in a university, college, school or other teaching establishment are taxable on that remuneration only in the first State.

12. Article 20(2) lays down detailed rules for the avoidance of double taxation of persons residing in France. As worded by the Additional Protocol of 9 June 1969, it provided as follows:

'(a) Subject to the provisions of (b) and (c), income arising in the Federal Republic which, under this Convention, is taxable in the Federal Republic shall be excluded from the basis of assessment in France. However, this rule shall not limit the right of France to take account of the income thus excluded when determining its rates of taxation.'

Since the entry into force of the Additional Protocol of 28 September 1989, the wording of the provision for the avoidance of double taxation of persons residing in France has been as follows:

'(a) Profits and other positive income arising in the Federal Republic and taxable there under the provisions of this Convention shall also be taxable in France where they accrue to a person resident in France. The German tax shall not be deductible for calculation of the taxable income in France. However, the recipient shall be entitled to a tax credit which may be set against the French tax charged on the taxable amount which includes that income. That tax credit shall be equal:

...

(cc) for all other income, to the amount of the French tax on the relevant income. This provision shall apply in particular to the income referred to in Articles ... 13(1) and (2) and 14.'

13. Article 21(1) provides for equal treatment of taxpayers in that nationals of one contracting State are not to be liable in the other contracting State for any tax or obligation relating thereto which is different from or more onerous than the taxes or obligations relating thereto to which nationals of that other State are or may be liable in the same situation.

The Community legislation

14. The provisions which are the subject of the national court's request for interpretation all form part of the EC Treaty and are as follows:

'Article 6

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited.

...'

'Article 48

...

2. [Freedom of movement for workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

...'

'Article 220

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

...

— the abolition of double taxation within the Community;

...'

15. In addition, Article 7 of Regulation No 1612/68 [3] provides as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...'

The different views put forward in the proceedings on the reference

16. Within the time-limit laid down for the purpose by Article 20 of the EC Statute of the Court of Justice, written observations were submitted by the plaintiffs in the main proceedings, the Governments of Belgium, Denmark, Germany, France, Italy, Finland, Sweden and the United Kingdom, and the Commission. During the oral procedure observations were submitted by the plaintiffs in the main proceedings and by the representatives of the Governments of Denmark, France, Italy, the Netherlands and the United Kingdom, and by the Commission.

3 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

17. The plaintiffs consider Mrs Gilly's tax situation to be discriminatory for three reasons: first, because Article 14(1) of the Franco-German Convention provides for treatment which differs according to the nationality of the taxpayer in so far as that nationality determines whether the income from employment paid by a public agency is taxable in the State which pays it or in the State of residence; secondly, because the same provision differentiates between frontier workers according to whether they work in the public or the private sector; and, thirdly, because Article 16 of the Franco-German Convention distinguishes between teachers residing in France according to whether they go to teach in Germany for a period of less or more than two years.

In addition, they assert, Mrs Gilly suffers double taxation in so far as, under the Franco-German Convention, her income from employment is taxable both in Germany, where she is deemed to be a single taxpayer without children (whereas in fact she is married and has two dependent children) and in France, where the income she receives in Germany is added to her husband's income for the purpose of calculating the total taxable income of the household. In this connection the plaintiffs add that the tax credit for tax paid abroad, laid down by the Convention for income from work as employees, reduces the double taxation slightly but does not eliminate it.

18. All the Member States which have submitted observations agree that the provisions of the Franco-German Convention which are regarded by the plaintiffs in the main proceedings as discriminatory and contrary to Article 48 of the Treaty are in reality entirely compatible with it and that Article 220 does not have direct effect.

19. Article 48, they maintain, does not prevent two Member States from applying, in order to eliminate double taxation on the income from employment of persons residing in one State and working in the other, different tax criteria depending on whether the taxpayers are employed in the public or the private sector, nor does it prevent such States from applying, for the same purpose, different tax criteria to public sector employees of one of them, depending on whether the taxpayer is or is not a national of that State or whether teachers residing in one State go to the other to work there for a period longer than two years or not.

Nor does Article 48 preclude, in the framework of a convention between two States for the avoidance of double taxation, the State where the taxpayer resides from taxing all his income, including that received in the other Member State, and granting him, in relation to the latter, a tax credit for tax paid abroad equal to the amount of the national tax on the relevant income.

Several Member States observe that the problem confronting the plaintiffs in the main proceedings does not arise from discriminatory treatment under French tax law, but from the difference between tax rates in the two countries, the rate being higher in Germany than in France. Some States draw the Court's attention to the repercussions which would ensue from a judgment interpreting Article 48 as precluding the provisions in question of the Franco-German Convention, because all those provisions conform with the model convention of the Organisation for Economic Cooperation and Development (OECD) for the avoidance of double taxation, on which most bilateral conventions signed by the Member States among themselves are based.

Article 220, they consider, does not have direct effect because it is not sufficiently clear and unconditional and does not confer upon individuals a right to the abolition of all double taxation within the Community.

20. The Commission begins with a detailed examination of the consequences of applying the Franco-German Convention to the tax situation of Mr and Mrs Gilly.

In France, where they reside, income tax is payable on the entire income of the couple (who constitute a household for tax purposes) irrespective of where the income is received. The French scale of tax rates and the French system of progressive tax are applied, and spouses cannot opt to be taxed separately. When calculating allowances and deductions for family commitments, account is taken of the taxable income in France, that is to say, the couple's total income. In the present case, as the income received in France is less than one half of the total income (Mr Gilly's income being 45%), he ends up by paying more income tax than if he were taxed separately.

In Germany, Mrs Gilly, whose income is approximately 55% of the couple's total income, is not entitled to the preferential scale for married couples, which is known as the 'Splittingtarif'. [4] She is automatically deemed to be single because her husband does not reside in Germany. In her case, application of the preferential scale would have resulted in reducing her tax liability in Germany because her income is more than one half of the couple's total income.

On that basis, the Commission considers that in Germany Mrs Gilly's liability to tax should have regard to her marital status, so

4 — 'Splitting' consists in aggregating the spouses' income and notionally attributing 50% to each. If the income of one spouse is greater than that of the other, this system levels out the taxable income and reduces the progressive increase in the scale of the tax.

that her husband's income in France should be taken into account. That would certainly ensure consistency in each State with regard to application of the progressive scale of its tax.

21. The Commission goes on to discuss Article 20(2)(a)(cc) of the Franco-German Convention in the light of Article 220 of the Treaty. It submits that Article 220 imposes on the Member States an obligation to act, namely to enter into negotiations if necessary, but not an obligation to achieve a specific result, and that bilateral conventions for the avoidance of double taxation meet the objective of Article 220. The Commission adds that, in its opinion, the machinery of the Convention avoids double taxation and that Community law does not prevent Mr and Mrs Gilly from being subject to a higher tax burden in so far as this is due to the higher rate of tax in Germany.

22. It concludes that the application of French law to the couple's total income and of German law to Mrs Gilly's income in Germany constitutes, by reason of the way in which her marital status is taken into account, an obstacle which is incompatible with the principles governing the freedom of movement of workers.

Preliminary observations

23. Before discussing the questions referred by the Tribunal Administratif, Strasbourg, I think it is necessary to comment on the following points:

A. The Court's jurisdiction, in the framework of the procedure laid down by Article 177, to give a ruling on the compatibility of the Franco-German Convention with Community law;

B. The admissibility of the fourth question from the national court, asking whether the principle of freedom of movement for workers, as embodied in the Treaty, is contravened by tax rules which are liable to affect the choice made by teachers in the contracting States as to whether to work on a more or less long-term basis in another State;

C. The provisions of Community law applicable to the main proceedings in relation to the prohibition of discrimination on the ground of nationality with regard to freedom of movement for workers.

24. I shall examine these questions in that order.

A. *The Court's jurisdiction, in the framework of the procedure laid down by Article 177, to give a ruling on the compatibility of the Franco-German Convention with Community law*

25. On this point I take the view that, just as the Court does not, within the framework of these proceedings, have jurisdiction to give a ruling on the compatibility of a national measure with Community law, [5] nor can it give a ruling on the compatibility with Community law of the provisions of an international treaty concluded by two Member States for the avoidance of double taxation.

Moreover, as the treaty in question is a bilateral convention on a matter such as direct taxation which is outside the Community's competence and which is regulated exclusively by the Member States, the Court could not even undertake to interpret it.

However, the rules governing freedom of movement for workers are within the ambit of Community law and the parties to the main proceedings are the tax authority of one of the Member States and a Community national who has exercised her freedom of movement and who considers herself a victim of discrimination arising from the provisions of a bilateral convention for the avoidance of double taxation. In those circumstances, the Court may give the national court guidance on the interpretation of the area of Community law which will enable it to give judgment in the main proceedings. [6]

I therefore propose that the Court reformulate the questions from the national court.

B. *The admissibility of the fourth question from the national court, asking whether Article 48 precludes a provision of the nature of Article 16 of the Franco-German Convention*

26. Under Article 16 of the Franco-German Convention, teachers habitually residing in one of the contracting States who, in the course of a temporary stay not exceeding two years in the other State, receive remuneration for teaching in a university, college, school or other teaching establishment are taxable on that remuneration only in the first State.

5 — Case C-134/95 *USSL No 47 di Biella* v *INAIL* [1997] ECR I-195, paragraph 17.

6 — Case 238/87 *Matteucci* v *Communauté Française de Belgique* [1988] ECR 5589, paragraph 14.

Mr and Mrs Gilly consider that this provision gives rise to discrimination in tax matters between teachers, contrary to the freedom to move between France and Germany, because teachers who reside in one of those States and teach in the other for a limited period have the status of frontier workers without having to reside or work in the frontier area, and thus pay less tax than teachers who, like Mrs Gilly, reside in France and decide to teach in Germany for more than two years.

27. In my opinion, the plaintiffs' purpose in advancing this argument, which is echoed in the national court's observation, in the order for reference, that Article 16 may influence the choice made by teachers in the contracting States as to whether to work on a more or less long-term basis in another State, is not so much to support a particular interpretation of the principle of freedom of movement for workers within the Community, as to obtain from the Court a ruling against Article 16 of the Franco-German Convention, which has not been applied to them.

28. In actual fact, it is not clear from the order for reference whether Mr and Mrs Gilly were in the situation to which Article 16 refers. According to the national court, Mr Gilly teaches in the French State education system and it does not appear that he has taught in Germany for a period either greater or less than two years. His wife teaches in the German State education system, in a post which she has held continuously for more than two years and again there is no indication that she previously taught in France for less than two years while resident in Germany. In reply to my question at the hearing, the plaintiffs confirmed these points.

29. There is a body of settled case-law concerning the respective roles of the national courts and the Court of Justice in the framework of the cooperation procedure provided for by Article 177 of the Treaty. According to that case-law, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment and the relevance of the questions to be put to the Court, [7] whereas it is a matter for the Court of Justice, in order to determine whether it has jurisdiction, to examine the conditions under which the case is referred to it by the national court. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver opinions on general or hypothetical questions. [8]

7 — Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 25; Case C-186/90 *Durighello* v *INPS* [1991] ECR I-5773, paragraph 8; and Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673, paragraph 15.

8 — Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171, paragraph 19, and *Lourenço Dias*, cited in footnote 7, paragraph 17.

30. Taking account of this function, the Court has held that it could not give a ruling on a question from a national court where the request for interpretation or examination of the validity of a rule of Community law bore no relation to the actual nature of the case or to the subject-matter of the main proceedings, [9] or where it was asked to give a ruling on a hypothetical problem without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it. [10]

The Court has held that it 'does not have jurisdiction to reply to questions of interpretation which are submitted within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute'. [11]

On this point the Court has added that it is essential for the national court to explain the reasons why it considers that a reply to its questions is necessary for it to give judgment, in order to enable the Court of Justice to ascertain whether the interpretation of Community law which is sought is related to the actual nature and subject-matter of the main proceedings. If it appears that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment. [12]

31. In the light of this case-law, and as it appears that neither of the plaintiffs before the national court has been in the situation covered by Article 16 of the Franco-German Convention — because neither of them has worked for less than two years in the contracting State other than the one in which they reside — I consider that a reply from the Court interpreting the Community law on freedom of movement for workers in the Community would be of no use to the national court in giving judgment in the case before it. For this reason I propose that the Court rule the fourth question inadmissible.

C. *The prohibition of discrimination on the ground of nationality with regard to the freedom of movement of workers*

32. The national court seeks interpretation of Article 6 of the Treaty, which prohibits all discrimination on the grounds of nationality. In this connection it must be observed that the Court has consistently held that this principle applies independently only to situations governed by Community law in

9 — Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6; *Durighello*, cited in footnote 7, paragraph 9; Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 7; and Case C-104/95 *Kontogeorgas* v *Kartonpak* [1996] ECR I-6643, paragraph 11.

10 — Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraphs 32 and 33.

11 — Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18.

12 — *Lourenço Dias*, cited in footnote 7, paragraphs 19 and 20.

respect of which the Treaty lays down no specific prohibition of discrimination. [13]

However, with regard to freedom of movement for workers, the principle of equal treatment has been given specific application by Article 48(2) of the Treaty, which provides for the abolition of all discrimination as regards employment, remuneration and other conditions of work. Furthermore, Article 7 of Regulation No 1612/68, which provides that a worker who is a national of a Member State is to enjoy, in the territory of other Member States, the same social and tax advantages as national workers, is a specific expression of the general principle of non-discrimination against workers by means of tax measures.

In this case, therefore, it is unnecessary to refer to Article 6 of the Treaty in order to reply to the questions from the Tribunal Administratif, Strasbourg.

Reformulation and discussion of the questions referred to the Court

33. So far as the other questions are concerned, I conclude from the statements of the national court in the order for reference that, in requesting a preliminary ruling under Article 177, it seeks clarification of the following points:

1. Firstly, whether Article 220 of the Treaty is directly applicable.

2. Secondly, whether the provisions of Article 13(1) and (5) and Article 14 of the Franco-German Convention are contrary to Article 48 of the Treaty and Article 7(2) of Regulation No 1612/68 in so far as they lay down criteria for the taxation of income from work as employees in one or the other State:

   — by reference to the place where the work is done;

   — according to whether the worker fulfils the conditions for being regarded as a frontier worker for the purpose of the Convention;

   — according to whether the worker receives public-service remuneration and, if so, depending on whether he is a national of the State other than the one paying the remuneration, without at the same time being a national of the latter.

13 — See the judgments in Case C-419/92 *Scholz* v *Opera Universitaria di Cagliari* [1994] ECR I-505, paragraph 6, and Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 20.

3. Thirdly, whether the provisions of Article 20(2)(a)(cc) of the Franco-German Convention are contrary to Articles 48 and 220 of the Treaty and Article 7(2) of Regulation No 1612/68 in so far as, to avoid double taxation of the income from employment of residents of one of the contracting States where such income is taxed in the other State, a procedure is laid down whereby a tax credit equal to the amount of the national tax on the relevant income is granted, irrespective of the amount of tax paid in the other State which, under certain circumstances, may mean that the taxpayer pays more income tax than he would have had to pay if the income in question had been earned in the State of residence, or more than he would have had to pay if the income had been earned in the other contracting State but taxed only in the State of residence.

First question: the possible direct effect of Article 220, second indent, of the Treaty

34. The national court's question here concerns the direct applicability of this provision, which states that the Member States are to enter, so far as is necessary, into negotiations with each other with a view to securing for the benefit of their nationals the abolition of double taxation within the Community.

I think the very wording of this provision shows that it is not sufficiently clear and unconditional for direct effect to be attributed to it and that it thus cannot give rise to rights in favour of individuals which the national courts must safeguard. I agree with the Commission that the second indent of Article 220 imposes on the Member States an obligation to act, namely to enter into negotiations so far as is necessary, but not an obligation to achieve a specific result.

35. I consider that the Court's case-law relating to the first indent of Article 220 — which requires the Member States, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals — should be applied to the second indent. The Court has stated that Article 220 is not intended to lay down a legal rule directly applicable as such, but merely defines a number of matters on which the Member States are to enter into negotiations with each other 'so far as is necessary'. [14]

Furthermore the provision, as worded, does not lay down an absolute obligation but leaves the Member States a wide discretion to decide whether to enter into negotiations. France and Germany exercised that discre-

14 — Case 137/84 *Mutsch* [1985] ECR 2681, paragraph 11.

tion when, in 1959, they signed the Convention for the avoidance of double taxation, which abrogated the 1934 Convention on the same subject, and also when they amended it by successive additional protocols in 1969 and 1989. By signing such a Convention, France and Germany shared between them the power to tax income received by their respective residents which is earned in or paid by the other contracting State.

Second question: equal treatment of workers as regards taxation and the provisions of the Franco-German Convention laying down criteria for the taxation of income from employment

36. To reply to this question, I must consider in some detail Article 13(1) and (5) and Article 14 of the Franco-German Convention, which lay down the criteria for the taxation of income from employment which may affect Mrs Gilly's tax situation directly or indirectly and, by extension, that of members of her household in so far as, because they reside in France, their aggregate income is taken into account under French law and they cannot be taxed separately.

37. In referring the questions, the national court appears to assume that Mrs Gilly must be deemed to have the status of a frontier worker because she is domiciled in the French frontier area and her place of work is situated in the German frontier area.

The term 'frontier worker' is defined in Article 13(5)(a) as covering those who work in the frontier area of one contracting State and have their permanent home in the frontier area of the other contracting State to which they normally return each day. 'Frontier area' is defined in Article 13(5)(b) and (c).

Under Article 13(5)(a), the income received by a frontier worker in the State of employment is taxed only in the State where he or she resides. Mrs Gilly seeks the status of a frontier worker and, in that way, her salary would not be taxed in Germany, but in France, where tax rates are lower.

38. However, a systematic examination of the contested provisions of the Convention shows that, firstly, the general rule is laid down by Article 13(1) that income from employment is taxable in the State of employment, and taxation of the income of

frontier workers only in the State where they reside is an exception to that general rule.

Secondly, Article 14(1) of the Convention lays down a *lex specialis* applying to 'public-service remuneration'. That is to say, remuneration paid by a State, a local or regional authority or a public entity. This *lex specialis* consists in turn of a general rule and an exception. The general rule is set out in the first sentence of Article 14(1) and states that, if the employer is a legal person governed by public law and if the employee resides in the other State, remuneration and retirement pensions paid in consideration for administrative or military services are taxable in the State paying them. The exception is given in the second sentence, which is to the effect that this abovementioned rule does not apply where the remuneration is paid to persons who have the nationality of the other State but are not at the same time nationals of the first State, in which case the remuneration is taxable only in the State where they are resident.

For example, the remuneration paid by the German State to a person residing in France is taxable in Germany. If, in the same situation, the recipient possesses French nationality, the remuneration will be taxable in France. If, like Mrs Gilly, the recipient is a national of both States, the right of the paying State to tax the remuneration prevails.

39. Community law does not require the Member States to lay down a different criterion for taxing the income from employment of frontier workers from that applying to other employed persons, State employees and persons treated as such, nor is this customary when concluding conventions for the avoidance of double taxation. [15] Moreover, a recent comparative study of the bilateral tax conventions concluded by France shows that, where a special tax regime is laid down for frontier workers, income is not always taxed in the State where the worker resides. [16]

40. Nor does Community law prohibit the Member States from laying down rules for frontier workers which differ from those applying to workers in general, employees of

15 — According to the report on frontier workers presented to the French National Assembly on 22 January 1997 (*Rapport d'information* No 3307) by Mr D. Jacquat, a *député*, on behalf of the Committee for Cultural, Family and Social Affairs, apart from Greece, which has no common frontiers with other Member States, and France, only six of the conventions concluded between the other Member States contain provisions relating to the remuneration of frontier workers. These are the Convention of 11 April 1967 between Germany and Belgium, that of 4 October 1954 between Germany and Austria, that of 29 June 1981 between Austria and Italy, that of 26 October 1993 between Spain and Portugal, that of 16 November 1973 between Sweden and Denmark, and that of 27 June 1993 between Sweden and Finland.

16 — Ibid., p. 31. Among the bilateral tax conventions signed by France, only five contain special provisions for frontier workers. These are the conventions with Germany, Belgium, Spain, Italy and Switzerland. The first four provide that income is to be taxed in the State of residence whereas, in the case of Switzerland, for the canton of Geneva, where a frontier area has not been demarcated, income is taxable at the place where the work is done and, for the other cantons, at the place of residence.

public authorities and persons treated as such, provided that this does not entail discrimination against workers who are nationals of other Member States, by comparison with national workers. Furthermore, such a practice is not unknown in Community law itself.

For example, in Regulation (EEC) No 1408/71, [17] adopted by the Council pursuant to its obligation under Article 51 of the Treaty, workers in general are, apart from certain exceptions, subject to the social security legislation of the State where they work, whereas civil servants and persons treated as such are subject to the social security legislation of the State to which the authority employing them belongs. For frontier workers, the regulation has a whole catalogue of special measures in chapters such as those relating to sickness insurance, accidents at work and occupational illnesses, unemployment and family benefits.

41. There is a special criterion for the taxation of public-service remuneration in Article 19 of the 1992 version of the OECD's model double taxation convention on income and capital ('the Model Convention'), which forms the basis of the bilateral conventions for the avoidance of double taxation concluded by the Member States. [18]

The Member States which have submitted written observations in this case point out that this provision is based on the comity of nations and mutual respect for the sovereignty of each State. The commentary on Article 19 of the Model Convention points out that the principle of giving the exclusive right of taxation to the paying State is contained in so many of the existing conventions between OECD Member States that it can be said to be already internationally accepted. With regard to the exception, the same commentary adds that it originates from the Vienna Convention of 18 April 1961 on Diplomatic Relations and the Vienna Convention of 24 April 1961 on Consular Relations, under which the host State has the right to tax the remuneration of the members of certain categories of the staff of foreign consular and diplomatic missions who reside permanently in that State or who are nationals thereof.

42. It is not disputed that, as it stands at present, Community law does not regulate

17 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

18 — As a recent example I may cite Article 19 of the Convention between the Kingdom of Spain and the French Republic for the avoidance of double taxation and the prevention of fraud and evasion with regard to taxes on income and assets, signed in Madrid on 10 October 1995 (*Boletín Oficial del Estado* 140, 12 June 1997), which contains the same rule for the taxation of public remuneration as Article 14 of the Franco-German Convention.

direct taxation. The tax provisions in Articles 95 to 99 of the EC Treaty relate only to indirect taxation. In secondary legislation, very few Community measures dealing with the direct taxation of natural persons have been adopted hitherto. Of these, the only one which is binding is Directive 77/799/EEC. [19] The others are merely a proposal for a directive submitted by the Commission to the Council on 21 December 1979 [20] and Recommendation 94/79/EC. [21]

43. Therefore direct taxation still falls within the competence of the Member States, as the Court has found in its past judgments on the subject. However, the States must exercise that competence consistently with Community law, refraining from any overt or covert discrimination on grounds of nationality. [22] In the present case it is necessary to ascertain whether, in signing the Convention, the Member States exercised that competence consistently with Community law and, in particular, with the provisions governing the freedom of movement of workers within the Community.

44. By signing a bilateral convention for the avoidance of double taxation, the two States concerned agree to limit their fiscal sovereignty and to waive part of it. It is not surprising that, when sharing the power to tax the income of their respective residents from employment in the other State, they use criteria such as those in Article 13(1) and (5) and Article 14 of the Franco-German Convention, namely the place where the work is performed, fulfilment of the conditions necessary for being deemed a frontier worker, whether the employer is a public-law entity and, if so, whether the taxpayer is a national of one State or the other. Nor are there many other possibilities.

In my opinion, those criteria, which have the purpose only of determining the power to tax certain income, are neutral with regard to freedom of movement for workers because, in the two States concerned, they do not, in tax matters, treat workers of other Member States less favourably than or differently from their own nationals who are in the same situation.

19 — Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

20 — Proposal for a Council directive concerning the harmonisation of income taxation provisions with respect to freedom of movement for workers within the Community (OJ 1980 C 21, p. 6).

21 — Commission Recommendation 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).

22 — Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 24; Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraph 21; Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493, paragraph 16; Case C-107/94 *Asscher* v *Staatssecretaris van Financiën* [1996] I-3089, paragraph 36; and Case C-250/95 *Futura Participations and Singer* v *Administration des Contributions* [1997] ECR I-2471, paragraph 19.

45. It cannot be branded as discriminatory to provide that the remuneration of an employed person is taxable in the State where he works or in the State where he resides or by the State paying the remuneration, even if, in the case of public-service remuneration, it is necessary in the final analysis to refer to the criterion of the recipient's nationality in order to decide which of the two States is to tax it, because for this purpose that is as neutral a criterion as the others. At the stage of applying the criteria for taxation, it is only necessary to decide in each case which of the two States is to tax the income. Then the State where the taxpayer resides and to which it falls to tax his total income will apply the legal procedure agreed upon with the other State in order, when calculating the tax payable under its own law, to avoid taxing once again the income from employment which has already been taxed in the other State. I shall discuss the legal procedure applied by France in more detail when examining the third question.

46. There is no doubt that, once the State which is to tax the income from employment has been determined, the tax payable will vary depending on which State it is. In Mrs Gilly's case, the tax she pays in Germany on the income from her employment is more than she would pay if she received the income in France or if, although received in Germany, it were taxable in France.

47. However, that difference does not arise from the taxation criteria in the Franco-German Convention, but from German tax law, which specifies a higher rate of tax on such income than the rate in France, while in addition the tax systems and the progressive nature of the tax differ considerably in the two States.

Such differences will remain until the Council adopts directives for harmonising fiscal provisions applying to direct taxes. As Article 100a(2) of the Treaty provides that Article 100a(1), which regulates the adoption of measures by a qualified majority, is not to apply to, *inter alia*, fiscal provisions, this is unlikely to happen in the short or medium term.

Third question: whether Article 20(2)(a)(cc) of the Franco-German Convention is contrary to Articles 48 and 220 of the Treaty and Article 7(2) of Regulation No 1612/68

48. This question refers to the procedure laid down in the Convention, whereby France avoids taxing once again income originating in Germany received by French residents after having borne tax in Germany. The procedure applies, *inter alia*, to remuneration covered by the general rule of taxation in the State where the work is performed, in accordance with Article 13(1), and public-service remuneration within the

meaning of Article 14. Under Article 20(2)(a)(cc), the procedure consists, firstly, in aggregating the income from employment earned in Germany with the taxable income calculated in accordance with French tax law, and then granting a tax credit in respect of the tax paid abroad, equal to the amount of the French tax on the relevant income.

49. Mrs Gilly contends that the application of this provision to the circumstances of her own case gives rise to discrimination on grounds of nationality, contrary to Article 48 of the Treaty and Article 7(2) of Regulation No 1612/68, because the income tax which she has to pay in France, which is where all the income of her tax household is taxed, is greater than she would have had to pay if it had fallen to France to tax her income received in Germany.

That would be the case if, for example, she had the status of a frontier worker or if she possessed French nationality only and not dual nationality. She considers that the abovementioned provisions mean that a worker who exercises the right to freedom of movement should not be penalised by a greater tax liability than if that right had not been exercised.

50. As interpreted by the Court in accordance with Article 48(2) of the Treaty, freedom of movement for workers entails the abolition of all discrimination based on nationality between workers of the Member States, particularly with regard to remuneration. The principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax. For that reason the Council laid down, in Article 7 of Regulation No 1612/68, that workers who are nationals of a Member State are to enjoy, in the territory of another Member State, the same tax advantages as national workers. [23]

The Court has also repeatedly held that Article 48 of the Treaty prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result. [24]

51. To find the existence of discrimination within the meaning of Community law in Mrs Gilly's case, it would be necessary to show that, by applying to her the provision in question, France, where she resides and where all her income is taxable together with that of her husband, treats her less favourably in respect of tax than a worker in the

23 — Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779, paragraphs 11 and 12.

24 — Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 9, and *Scholz*, cited in footnote 13, paragraph 9.

same situation who has French nationality. In this connection it is irrelevant that Mrs Gilly is also a national of the State to which she attributes discriminatory treatment because, as the Court has observed, any Community 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 another Member State, falls within the scope of Article 48 of the Treaty. [25]

52. It must also be borne in mind that, according to the definition given by the Court, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. [26]

53. When must a worker of French nationality be deemed to be in a situation comparable, for tax purposes, to that of Mrs Gilly? It all depends on what is meant by 'comparable situation'. Of course, it is possible to proceed by assuming that all the circumstances are the same and changing only the nationality of the person who is claimed to be the victim of discrimination. On that basis, the equivalent for comparison with Mrs Gilly would be a French worker who is not at the same time a German national, who receives remuneration from the German State for work in Germany, who resides in France, who is married and, who in relation to his or her spouse, contributes to the family income in the same proportion as Mrs Gilly. In practice, the public-service remuneration of such a person would be taxable in France, there would be no reason for using the procedure for avoiding double taxation and the amount paid by the couple as income tax in France would be less than the total tax paid by Mrs Gilly in Germany and her tax household in France. That is the reasoning of the plaintiffs in the main proceedings to show that Mrs Gilly suffers discrimination.

54. However, there is another method, which consists in making the comparison with a worker of French nationality whose remuneration is taxed in Germany under Article 13(1) of the Franco-German Convention and who resides in France, where he or she is liable to income tax on all his or her income. Such would be the case, for example, of a married worker employed in a private undertaking in Germany, residing in France and with a spouse who resides and works in France, provided that the two spouses contribute to the family income in the same proportion as Mr and Mrs Gilly. In that situation, even after being taxed in Germany, the income from employment will be aggregated with the French taxable income and then a credit will be given for the tax paid in Germany, equal to the French tax appropriate to that income.

25 — *Scholz*, cited in footnote 13, paragraph 9.
26 — *Schumacker*, cited in footnote 22, paragraph 30.

55. In my opinion, there are a number of reasons why the second method is the correct one for determining whether a provision such as that in question here is contrary to Article 48:

(a) Firstly, because, before applying Article 20(2)(a)(cc) of the Convention, which lays down the procedure whereby France, as the State to which it falls to tax the total income of its residents, avoids the double taxation of income which has already been taxed in Germany, it is necessary, as a first and essential step, to determine, by applying the taxation criteria of the Convention, which of the two States should tax income from employment. As I have mentioned when discussing the national court's second question, these criteria, which are the place where the work is done, fulfilment of the conditions for being deemed a frontier worker, whether the remuneration is public-service remuneration and, if so, whether the taxpayer is a national of one State or the other, are neutral from the viewpoint of the Community law relating to freedom of movement for workers.

(b) Secondly, because, after the different items of the taxpayer's income have been taxed in one or the other State, the State of residence must apply the procedure agreed upon with the other State in order to avoid a further tax charge on that income. The result will be more or less favourable to the employee, depending on the national tax legislation and the personal and family situation of each taxpayer.

56. If the second method is used, a perfect parallel is obtained from the outset: income from work as an employee received in Germany by a person resident in France and taxed in Germany, the person being in the same family situation as Mrs Gilly. In this way it can be shown that her tax treatment in France is the same as that of a French person in the same situation.

If the first method is used, however, the starting-point is the result obtained after application of the system for avoiding double taxation. In other words, Mrs Gilly pays more income tax in France than she would if she had French nationality, all else being equal, and from this finding one works back to the beginning.

57. Does Mrs Gilly suffer covert discrimination because, as the Commission maintains, her family situation is not taken into account either in Germany, since her husband does not reside there and consequently they cannot have the benefit of the preferential scale for married couples, or in France,

since the fact that the couple's family situation is taken into account there affects only Mr Gilly's income?

58. I consider that the reply in this case must be in the negative. As the Court has previously observed, in relation to direct taxes, the situations of residents and non-residents are not, as a rule, comparable and the fact that a Member State does not grant a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation. Accordingly Article 48 of the Treaty does not in principle preclude the application of rules of a Member State under which a non-resident working as an employed person in that State is taxed more heavily on his or her income than a resident in the same employment.

To reach that conclusion, the Court reasoned as follows: '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. Moreover, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode. Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organisation for Economic Cooperation and Development (OECD), recognises that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence'. The Court added that 'the situation of a resident is different in so far as the major part of his income is normally concentrated in the State of residence. Moreover, that State generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of his personal and family circumstances'. [27]

59. The only cases in which the Court has not followed this reasoning are those involving workers who did not receive significant income in their State of residence so that their tax liability in that country was not sufficient for their personal and family situation to be taken into account, and who received most of their income, and almost all their household income, in a different Member State. In such cases, there is discrimination against the worker in so far as his personal and family situation is not taken into account in the State of residence or the State of employment. [28]

However, this cannot be said to apply to Mrs Gilly who, although as an individual she receives almost all her income in Germany in

27 — *Schumacker*, cited in footnote 22, paragraphs 31 to 35.

28 — The Court found discrimination of this kind in the *Schumacker*, *Wielockx* and *Asscher* judgments cited in footnote 22.

the form of her salary, has her personal and family situation taken into account in France, where her salary is aggregated with the taxable income of her tax household and where she is granted the tax reliefs, rebates and deductions laid down by French tax law.

60. The remaining point to consider is whether the legal procedure used by France to avoid double taxation under Article 20(2)(a)(cc) of the Franco-German Convention is an obstacle, prohibited by Article 48 of the Treaty, to the freedom of movement of workers. For this purpose the question is whether, although it applies irrespective of nationality, that procedure in fact has an adverse effect on persons who have exercised their freedom of movement by treating them less favourably than those who have not done so.

In that connection the Court has observed that 'the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude [national] measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'. [29]

61. Here again, the reply must be in the negative because if Germany were simply to make a sufficient reduction in its present rate of tax on income from employment, the procedure which is now criticised for adversely affecting workers exercising their freedom of movement would have the opposite effect. If the German tax rate were lower than the French rate on the same income, with Mrs Gilly receiving, in respect of tax paid abroad, a tax credit equal to the amount of the French tax on the relevant income, the tax credit would be greater than the tax already paid in Germany and she would end up by paying less tax on that income than if she had received it in France or if, having been received in Germany, it had been taxed in France in accordance with the criteria described above. A similar situation could arise if France were to decide to increase its rate of tax on such income to a rate higher than the German rate.

Whether the consequences of a provision such as that in question here are unfavourable to workers depends, in the final analysis, on the tax rates charged in each Member State on certain income and I therefore consider that those consequences are too uncertain and indirect for the provision to be regarded as being capable of deterring a worker from exercising his or her freedom of movement between the two Member States in question. [30]

29 — See the judgment in Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 94.

30 — See Case C-134/94 *Esso Española* v *Comunidad Autónoma de Canarias* [1995] ECR I-4223, paragraph 24.

62. Finally, Mrs Gilly contends that the second indent of Article 220 of the Treaty precludes her German income which has already been taxed in Germany from being taken into account in France in the calculation of the taxable income of her household for income tax purposes, because the French tax credit for tax paid abroad does not take account of the exact amount of tax paid in Germany, which means that the procedure does not avoid double taxation, but only reduces it.

63. Articles 23A and 23B of the Model Convention for the avoidance of double taxation envisage two methods for achieving this result which, for the sake of clarity, are worth examining in some detail.

64. Article 23A lays down the rules for the 'exemption with progression' method. Where a resident of a contracting State receives income which, according to the Convention, may be taxed in the other State, the first State exempts the income from tax. However, it may take the income into account when determining the rate applying to the income received in the State of residence. In other words, although the income received in the source State does not form part of the taxable income in the State of residence, the total tax payable in the latter is increased by the effect of progressive taxation in the country of residence.

Article 23B covers the 'full credit' or 'ordinary credit' method. Unlike the method described above, this aggregates the taxpayer's total income, whether of national origin or not, in the taxable income of the State of residence. Where a resident of one State receives income which, according to the Convention, may be taxed in the other State, the first State deducts from the tax charged on the resident's income an amount equal to the income tax paid in the other State. However, such deduction may not exceed that part of its own income tax, calculated before deduction, which is attributable to the income taxable in the other State.

65. The legal procedure used by France, since the entry into force of the Additional Protocol of 1989, to avoid the further taxation in France of income from employment which has already been taxed in Germany under the Convention, consists in granting a tax credit equal to the amount of tax on the relevant income. The method previously used consisted in exempting income already taxed in Germany, although it was taken into account for determining the rate applying to income received in France. In the final analysis these two methods, which at first appear to be different, produce the same result.

66. The object of a bilateral double taxation convention is to prevent income which is taxed in one State from being taxed again in

the other. The object is not, therefore, to ensure that the tax paid by the taxpayer in one State is not more than would be payable in the other, regardless of where the income was received and whatever its specific source. In actual fact, bilateral taxation conventions, in accordance with Article 24 of the Model Convention, lay down a rule of equal treatment between nationals and citizens of the other State.

67. In no case, therefore, does the right to freedom of movement for workers confer upon them a right to be granted, in their State of residence, the tax status which is most favourable to them in particular. They have a right only to the same tax treatment as nationals of that State. Moreover, I consider, this result is achieved by using the procedure laid down in the provision in question.

Conclusion

68. In the light of the foregoing, I propose that the Court should:

(A) rule that the fourth question referred by the Tribunal Administratif, Strasbourg, is inadmissible;

(B) reply as follows to the other questions:

(1) The second indent of Article 220 of the Treaty does not have direct effect.

(2) Articles 48 and 220 of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community must be interpreted as meaning that they do not preclude a convention between two Member States for the avoidance of double taxation from laying down criteria for the taxation of income from employment in one or the other State:

— by reference to the place where the work is done; or

— according to whether the worker fulfils the conditions for being regarded as a frontier worker; or

— according to whether the worker receives public-service remuneration and, if so, depending on whether he is a national of the State other than the one paying the remuneration, without at the same time being a national of the latter.

(3) Articles 48 and 220 of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68 must be interpreted as meaning that they do not preclude a convention between two Member States for the avoidance of double taxation from laying down that, in one of them, double taxation is avoided by means of a procedure of the kind referred to in Article 20(2)(a)(cc) of the Franco-German Convention, under which income received in Germany by a resident in France, which has already been taxed in Germany, is taken into consideration for the purpose of calculating the taxpayer's taxable income in France by granting a tax credit in respect of the tax paid abroad, equal to the amount of the French tax on the relevant income.