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Opinion Statement ECJ-TF 4/2013 of the CFE

on the decision of the European Court of Justice in case C-425/11, Katja Ettwein, concerning personal tax benefits in Germany for Swiss residents

Prepared by the ECJ Task Force of the CFE

Submitted to the European Institutions

in December 2013

This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on Case C-425/11 Katja Ettwein. The CFE is the leading European association of the tax profession with 33 national tax adviser organisations from 25 European countries representing over 180,000 tax advisers. CFE is registered in the EU Transparency Register (no. 3543183647-05).

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1. This Opinion Statement analyses the ECJ decision on the Case C-425/11 *Katja Ettwein*, concerning a personal tax advantage for self-employed frontier workers under the 2002 EC-Switzerland Agreement on the free movement of persons (the "Agreement").[2]

2. More specifically, *Ettwein* addresses the impact of the Agreement on the availability of the German splitting regime to Swiss residents who are German nationals and receive all their income in Germany. This regime aggregates the total income of the spouses, then notionally attributes 50% of it to each of them and taxes it accordingly. Therefore, if the income of one spouse is high and that of the other low, "splitting" levels out their taxable amounts and palliates the progressive nature of the income tax scales. The availability of "splitting" has already been at issue for intra-EU situations in *Schumacker*,[3] *Gschwind*[4] and *Zurstrassen*,[5] and the German legislator has indeed subsequently extended the benefit to EU and EEA residents, but not done so for Swiss residents[6].

3. Following a request by the German *Finanzgericht* Baden-Württemberg in *Ettwein*,[7] the ECJ – in stark contrast to Advocate General *Jääskinen's* opinion[8] – indeed found that certain provisions of the Agreement preclude the refusal of "splitting" on the sole ground that the taxpayers' residence is in Switzerland.[9] This development mirrors a judgment by the Swiss *Bundesgericht*, which has likewise found that a non-resident Swiss national can rely on the Agreement against his own state and is entitled to the same personal and family benefits as Swiss residents.[10]

I. The facts and the legal background

4. A married couple, Mr and Mrs Ettwein, both German nationals, transferred their residence from Germany to Switzerland on 1 August 2007, but continued to work on a self-employed basis in

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[2] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, [2002] OJ L 114/6 (30 April 2002).

[3] ECJ, 14 February 1995, Case C-279/93 *Schumacker* [1995] ECR I-225.

[4] ECJ, 14 September 1999, Case C-391/97 *Gschwind* [1999] ECR I-5451.

[5] ECJ, 16 May 2000, Case C-87/99 *Zustrassen* [2000] ECR I-3337.

[6] For Germany's reaction to Ettwein see the Circular by the German Federal Ministry of Finance of 16 September 2013, IV C 3 – S 1325/11/10014, which extends benefits to EU- and EEA-nationals resident in Switzerland. The Circular, however, does not address the situation of Swiss nationals.

[7] FG Baden-Württemberg, 7 July 2011, 3 K 375/10.

[8] Opinion of AG Jääskinen of 18 October 2012, Case C-425/11, *Katja Ettwein*.

[9] Judgment of 28 February 2013, Case C-425/11, *Katja Ettwein*. It might also be noted that the Finanzgericht Baden-Württemberg has already issued a final judgment in that case and ordered the tax office to apply spousal splitting; see FG Baden-Württemberg, 18 April 2013, 3 K 825/13.

[10] Bundesgericht, 26 January 2010, 2C_319/2009 and 2C_312/2009, BGE 136 II 241.

Germany, receiving all their income there. With respect to the calculation of tax on their income for the 2008 taxable year, Mr and Mrs Ettwein requested, as in previous tax years, to be taxed jointly, that is, by the "splitting" method. They declared to German tax authorities that they had not obtained any taxable income in Switzerland. The *Finanzamt Konstanz* denied such treatment, arguing that their residence was neither in the territory of a Member State of the European Union, nor in that of a State party to the EEA Agreement. It was clear, however, that all other conditions required by German national law under §§ 1(3), 1a, 26(1) of the German Income Tax Act (EStG), which implement the *Schumacker* case law, would otherwise be met, including a certificate by the Swiss tax administration that no Swiss income was derived by Mr and Mrs Ettwein.

5. Following an unsuccessful administrative complaint, Mrs Ettwein brought proceedings for annulment before the Finanzgericht Baden-Württemberg. In its decision of 7 July 2011,[11] that court considers that Mr and Mrs Ettwein are "self-employed frontier workers" within the meaning of Article 13(1) of Annex I to the Agreement, since they are German nationals resident in Switzerland, work on a self-employed basis in the territory of the Federal Republic of Germany, and return from their place of business to their place of residence every day. In accordance with Articles 9(2) and 15(2) of Annex I to the Agreement, self-employed frontier workers enjoy the same tax and social security advantages in the territory of the State in which they pursue their activity as self-employed nationals. The *Finanzgericht* Baden-Württemberg is inclined to consider that the fact that Mr and Mrs Ettwein were refused the benefit of the "splitting" method solely because they are resident in Switzerland is contrary to those provisions of the Agreement, and that – in light of *Schumacker*[12] and *Asscher*[13] – Germany is under an obligation to take into account the personal and family situation for the purpose of calculating tax to eliminate the covert discrimination at issue.

II. The preliminary questions and the decision

The question

6. The Finanzgericht Baden-Württemberg[14] referred the following question to the ECJ for a preliminary ruling:

"Are the provisions of the [Agreement], in particular Articles 1, 2, 11, 16 and 21 thereof and Articles 9, 13 and 15 of Annex I thereto, to be interpreted as precluding the benefit of joint taxation with the use of the 'splitting' procedure from being refused to spouses residing in Switzerland who are subject to taxation in the Federal Republic of Germany on their entire taxable income?"

Advocate General Jääskinen's Opinion

7. In his opinion of 18 October 2012, Advocate General *Jääskinen* recommended that the question should be answered in the negative, i.e., that the Agreement does *not* preclude a rule in a Member State under which the benefit of "splitting" is refused to a married couple who are nationals of that State, pursue a self-employed activity there and are subject to tax on all their

[11] FG Baden-Württemberg, 7 July 2011, 3 K 375/10.
[12] ECJ, 14 February 1995, Case C-279/93 *Schumacker* [1995] ECR I-225.
[13] ECJ, 27 June 1996, Case C-107/94 *Asscher* [1996] ECR I-3089.
[14] FG Baden-Württemberg, 7 July 2011, 3 K 375/10.

taxable income there on the sole ground that that couple has moved its place of residence from that State to Switzerland. He arrived at this result based on three prongs of argumentation:

8. First, AG *Jääskinen* relied on *Grimme*,[15] *Fokus Invest*[16] and *Hengartner and Gasser*[17] and pointed out that the nature of the Agreement is one of international law. Hence, the provisions of EU law concerning the internal market cannot be automatically applied to the interpretation of the Agreement by analogy, unless expressly so provided in the Agreement itself. Also, the objective of the Agreement is not the creation of an internal market but rather to strengthen relations between the contracting parties without any prospect of extending the application of the fundamental freedoms in full to Switzerland. These different objectives and contexts of the Agreement on the one hand and European integration on the other also inform the interpretation of the Agreement.

9. Second, the Advocate General concluded that Mr and Mrs Ettwein do not fall within the Agreement's *ratione materiae*, reasoning that – unlike for rights flowing from secondary legislation under Article 16(1) of the Agreement in light of *Bergström*[18] – the Agreement does not address discriminations exercised by one state against its own nationals as a consequence of a move in residency. AG *Jääskinen* arrives at that result based on a literal interpretation of Articles 12, 15(2) and 9 of Annex I to the Agreement, which seemingly do not address discriminations by a state (Germany) against its own nationals (Germans).[19] In making this interpretation, AG *Jääskinen* moreover notes that "self-employed frontier workers" within the meaning of Article 13(1) of Annex I[20] are merely a sub-category of self-employed persons within the meaning of Article 12 of Annex I, so that the former provision has to be read as not applying to situations where the State of work and the State of nationality are the same. Hence, as Mr and Mrs Ettwein pursue a professional activity as self-employed persons in the Member State of which they are nationals (Germany), in AG *Jääskinen's* view they do not derive rights from the provisions of the EC-Switzerland Agreement on freedom of establishment, equal treatment and non-discrimination, which do not apply to them.

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[15] ECJ, 12 November 2009, Case C-351/08 *Grimme* [2009] ECR I-10777, paras. 27 and 29.

[16] ECJ, 11 February 2010, Case C-541/08 *Fokus Invest* [2010] ECR I-1025, para. 28.

[17] ECJ, 15 July 2010, Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7233, paras. 41 and 42.

[18] ECJ, 15 December 2011, Case C-257/10 *Bergström* [2011] ECR I-0000, paras. 26 to 30 and 33 to 34.

[19] Article 12 of Annex I deals with "rules regarding residence" and establishes a rule for the issuance of a residence permit for "[a] national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (hereinafter referred to as a 'self-employed person')". Article 15(2) of Annex I makes Article 9 of Annex I applicable for self-employed persons. Article 9 of Annex I in turn provides in its paragraphs 1 and 2 as follows:
"1. An employed person who is a national of a Contracting Party may not, by reason of his nationality, be treated differently in the territory of the other Contracting Party from national employed persons as regards conditions of employment and working conditions, especially as regards pay, dismissal, or reinstatement or re-employment if he becomes unemployed.
2. An employed person and the members of his family referred to in Article 3 of this Annex shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family."

[20] Article 13(1) of Annex I, entitled "Self-employed frontier workers", provides:
"A self-employed frontier worker is a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day or at least once a week".

10. Finally, AG *Jääskinen's* opinion deals with the interpretative rules provided in Article 16 of the Agreement.[21] The AG dismisses the relevance of *Schumacker*, as he finds the corresponding provisions of the Agreement not being applicable in this case. He nevertheless points to *Werner*,[22] according to which a mere change in residence could not be regarded as an act of establishment at the time the Agreement was signed. Also, *Asscher*[23] is distinguished based on the fact that Mr and Mrs Ettwein are subject to tax in respect of all their taxable income in their Member State of origin (Germany). Finally, Article 16(2) of the Agreement is viewed as barring recourse to cases decided by the ECJ after the date the Agreement was signed (21 June 1999), such as, e.g., *Ritter-Coulais*.[24]

The Court's decision

11. In its judgment of 28 February 2013 the ECJ arrived at the opposite result. Contrary to the interpretation proposed by AG *Jääskinen* it held that Article 1(a) of the Agreement and Articles 9(2), 13(1) and 15(2) of Annex I to the Agreement indeed preclude legislation that refuses the benefit of joint taxation with the use of the "splitting" method, which is available to spouses who are nationals of that State and subject to income tax in that State on their entire taxable income, on the sole ground that their residence is situated in the territory of the Swiss Confederation. Without even mentioning Article 16 of the Agreement, but pointing at the objective expressed in Article 1(a) of the Agreement and its preamble, the Court arrives at this result in a three-pronged reasoning.

12. First, the Court – relying on *Bergström*[25] – noted that it is possible that nationals of a contracting party may also claim rights under the Agreement against their own country, in certain circumstances and in accordance with the provisions applicable. The Court then takes a step-by-step interpretation of the Agreement:
    - Article 13 of Annex I on "self-employed frontier workers" only draws a distinction between the place of residence and the place where the self-employed activity is pursued, regardless of which nationality of the Contracting Parties is held.. Hence, that provision applies to Mr and Mrs Ettwein, who return home from their place of business every day: They are nationals "of a Contracting Party" (Germany), are resident in the territory "of a Contracting Party" (Switzerland), and pursue a self-employed activity in the territory "of the other Contracting Party" (Germany).

[21] Article 16 is entitled "Reference to Community law" and reads as follows:
"1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.
2. Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law."

[22] ECJ, 26 January 1993, Case C-112/91 *Werner* [1993] ECR I-429.

[23] ECJ, 27 June 1996, Case C-107/94 *Asscher* [1996] ECR I-3089.

[24] ECJ, 21 February 2006, Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711.

[25] ECJ, 15 December 2011, Case C-257/10 *Bergström* [2011] ECR I-0000, paras. 27 to 34.

- The Court then rejects the notion that the concept of "self-employed frontier workers" under Article 13 of Annex I has to be comprehended within the concept of "self-employed person" under Article 12 of Annex I.[26]
- Finally, this result is confirmed by Article 24(1) of Annex I, which lays down a right of residence, namely the right of nationals of one Contracting Party to establish their residence in the territory of the other Contracting Party regardless of the pursuit of an economic activity.[27] It is frontier workers, such as Mr and Mrs Ettwein, in particular who must be able to benefit fully from that right, while maintaining their economic activity in their country of origin.

13. Second, as Mr and Mrs Ettwein are "self-employed frontier workers" within the meaning of Article 13(1) of Annex I, the principle of equal treatment stated in Article 15(1) of Annex I applies to them also, the "host country" within the meaning of the latter provision being, in their situation, Germany.[28] From Article 9(2) of Annex I, which is made applicable to self-employed frontier workers by Article 15(2) of Annex I, it is moreover apparent that the principle of equal treatment extends also to tax concessions. It hence follows from that application *mutatis mutandis* that a self-employed frontier worker enjoys, in the host country, the same tax advantages as self-employed persons pursuing their activity in that country and residing there.

14. Third, the Court understands Article 21(2) of the Agreement[29] as allowing different treatment, in tax matters, of resident and non-resident taxpayers, but only where they are not in a comparable situation. Referring to *Schumacker* as well as to *Asscher*[30] and *Wielockx*,[31] the Court confirms the main lines of the respective intra-EU case law and extends them to the Agreement: With regard to a taxpayer's personal and family circumstances the situations of residents and non-residents are as a general rule not comparable. However, comparability exists where a non-resident taxpayer – employed or self-employed – receives no significant income in his State of residence and obtains the major part of his taxable income from an activity pursued in another State. Such taxpayer is objectively in the same situation, as regards income tax and the taking

[26] The Court gives three arguments for this conclusion: *(1)* Both concepts are defined by separate provisions; *(2)* contrary to the rule of Article 12 of Annex I, "self-employed frontier workers" do not require a residence permit; and *(3)* the fact that the contracting parties devoted a separate provision to self-employed frontier workers emphasizes the special situation of that category of self-employed persons and denotes an intention to facilitate their movement and mobility.

[27] Article 24 of Annex I lays down "Rules regarding residence" and reads in its first paragraph:
"1. A person who is a national of a Contracting Party not pursuing an economic activity in the state of residence and having no right of residence pursuant to other provisions of this Agreement shall receive a residence permit valid for at least five years provided he proves to the competent national authorities that he possesses for himself and the members of his family:
(a) sufficient financial means not to have to apply for social assistance benefits during their stay;
(b) all-risks sickness insurance cover."

[28] Article 15(1) of Annex I, entitled "Equal treatment", reads:
"1. As regards access to a self-employed activity and the pursuit thereof, a self-employed worker shall be afforded no less favourable treatment in the host country than that accorded to its own nationals."

[29] Article 21 of the Agreement deals with the "Relationship to bilateral agreements on double taxation" and provides in its paragraph 2:
"2. No provision of this Agreement may be interpreted in such a way as to prevent the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence."

[30] ECJ, 27 June 1996, Case C-107/94 *Asscher* [1996] ECR I-3089.

[31] ECJ, 11 August 1995, Case C-80/94 *Wielockx* [1995] ECR I-2493.

into account of their personal and family circumstances, as a resident of that State who pursues comparable activities there. Hence, Article 21(2) of the Agreement cannot be relied on by a Contracting Party (i.e., Germany) in order to refuse spouses who pursue their business activities in that State, receive all their income there and are subject to unlimited liability to income tax there the tax advantage, linked to their personal and family situation, consisting in the application of the "splitting" method, on the sole ground that the spouses' place of residence is located in the other Contracting Party (i.e., Switzerland).

III. Comments

15. The judgment is significant for a number of reasons. It should be noted that, given the identical concepts of Articles 7 and 13 of Annex I, the *Ettwein* judgment is relevant for "employed frontier workers" and "self-employed frontier workers" alike. As for the latter group, the ECJ confirms its decisions in *Stamm and Hauser*[32] and *Graf and Engel*[33] according to which the principle of equal treatment, laid down in Article 15(1) of Annex I, concerning access to a self-employed activity and the pursuit thereof, is valid not only for "self-employed persons" within the meaning of Article 12(1) of Annex I, which are explicitly mentioned in Article 15(1) of Annex I, but also for "self-employed frontier workers" within the meaning of Article 13 of Annex I. Hence, self-employed frontier workers are entitled to non-discriminatory tax treatment in comparison with self-employed persons in the host State.

16. The ECJ also sheds light on the issue of discrimination of own nationals by a State and the evolving case-law on this point. AG *Jääskinen's* opinion has relied on *Grimme,* according to which Article 9 of Annex I "only concerns the case of discrimination by reason of nationality against a national of a Contracting Party in the territory of another Contracting Party",[34] i.e., only a discrimination by the authorities of a Contracting Party against a national of another Contracting Party would be covered by Article 9 of Annex I. However, *Bergström*[35] established that nationals of a Contracting Party may also claim rights under the Agreement against their own country, in certain circumstances and in accordance with the provisions applicable. While AG *Jääskinen* seems to read *Bergström* narrowly, i.e. relating only to rights flowing from secondary Union law referred to by Article 16(1) of the Agreement and at issue in that case, the Court in *Ettwein* broke the ground for a broader understanding in line with intra-EU case-law, such as *Asscher*.[36] It is hence sufficient for the Agreement to apply (at least to employed and self-employed frontier workers) that the taxpayer's residence and his place of business are in different States, irrespective of whether a taxpayer covered by the Agreement is also a national of the latter State.

17. The ECJ in *Ettwein* held that it follows from Article 15(1) and (2) in conjunction with Article 9(2) of Annex I that a self-employed frontier worker enjoys, in the host country, the same tax advantages as self-employed persons pursuing their activity in that country and residing there. The Court obviously did not find it necessary to address the issue that the wording of Article 9 and Article 15 of Annex I only deals with discrimination based on nationality, i.e., overt discrimination. This said, *Ettwein* seems to implicitly extend *Graf and Engel* to also scrutinize

[32] ECJ, 22 December 2008, Case C-13/08 *Stamm and Hauser* [2008] ECR I-11087, paras. 47 to 49.
[33] ECJ, 6 October 2011, Case C-506/10 *Graf and Engel* [2011] ECR I-0000, para. 23.
[34] ECJ, 12 November 2009, Case C‑351/08 *Grimme* [2009] ECR I‑10777, paras. 48.
[35] ECJ, 15 December 2011, Case C-257/10 *Bergström* [2011] ECR I-0000, paras. 27 to 34.
[36] ECJ, 27 June 1996, Case C-107/94 *Asscher* [1996] ECR I-3089.

covert discrimination based on criteria other than nationality: In *Graf and Engel*, the ECJ found that "the principle of equal treatment, which is a concept of European Union law", established before 1999 (Article 16(2)), "prohibits not only overt discrimination, based on nationality, but also all covert forms of discrimination which, through application of other criteria of differentiation, lead in fact to the same result".[37] Just like in respect of the application of the fundamental freedoms within the EU, the Agreement does not require empirical proof that the legislation affects a much greater number of nationals of the other Contracting Party than nationals of the Member State in whose territory that legislation applies.[38]

18. The Court views Article 21(2) of the Agreement as permitting different treatment of resident and non-resident taxpayers where they are not in a comparable situation, and, *vice versa*, the different treatment of taxpayers in comparable situations as discrimination that is in principle prohibited. To establish comparability of taxpayers' situations the Court relies on its intra-EU case-law established in, *inter alia*, *Schumacker*,[39] *Asscher*[40] and *Wielockx*.[41]The Court did not address the effects of the exemption method flowing from Article 24(2) of the 1971 Germany-Switzerland tax treaty. It only stated that the Ettweins "did not receive income" in Switzerland, probably based on the stated facts of the case that there was no taxable income in Switzerland (which was also confirmed in a certificate by the Swiss tax administration), without disclosing if this income was not taxed under domestic Swiss law or was exempt under the tax treaty.

19. The Court, however, did not address the issue whether discrimination may nevertheless be justified. More concretely, the ECJ did not make the application of the *Schumacker*-principle dependent on the question of whether Switzerland was under an obligation to exchange relevant information with Germany (which it was not in the taxable year in question). This issue was, however, explicitly addressed (and rejected) by the Court, e.g., in *Schumacker*[42] and *Wielockx*,[43] and plays a significant role when it comes to the impact of the freedom of capital movement in third-country situations and the potential justification of a discriminatory measure based on the need to safeguard the effectiveness of fiscal supervision.[44]

    - One explanation for this silence in *Ettwein* may be that neither Germany nor any other party raised the issue before the Court. Indeed, the Finanzgericht Baden-Württemberg[45] pointed out in its reference for a preliminary ruling that despite the lack of exchange of information between Germany and Switzerland, Mr and Mrs Ettwein had offered sufficient proof that

[37] ECJ, 6 October 2011, Case C-506/10 *Graf and Engel* [2011] ECR I-0000, para. 26.

[38] If it could be read from *Graf and Engel*that empirical evidence were indeed necessary (ECJ, 6 October 2011, Case C-506/10 *Graf and Engel* [2011] ECR I-0000, paras. 27 and 36), this approach was rejected in *Ettwein*. Since in *Ettwein* the Court refers to *Schumacker* and *Asscher*, which have been built on a body of case-law that does not require empirical evidence to identify covert discrimination, it is clear that empirical evidence is not necessary either to establish covert discrimination under the Agreement.

[39] ECJ, 14 February 1995, Case C-279/93 *Schumacker* [1995] ECR I-225.

[40] ECJ, 27 June 1996, Case C-107/94 *Asscher* [1996] ECR I-3089.

[41] ECJ, 11 August 1995, Case C-80/94 *Wielockx* [1995] ECR I-2493.

[42] ECJ, 14 February 1995, Case C-279/93 *Schumacker* [1995] ECR I-225, paras. 43-45.

[43] ECJ, 11 August 1995, Case C-80/94 *Wielockx* [1995] ECR I-2493, paras. 26

[44] See, e.g., ECJ, 18 December 2007, Case C-101/05 *A* [2007] ECR I-11531, paras. 58-64; ECJ, 28 October 2010, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, paras. 40-51.

[45] FG Baden-Württemberg, 7 July 2011, 3 K 375/10.

they did not derive any income from Switzerland (i.e., a certificate by the Swiss tax administration).[46]

- Another explanation could be that, in light of the fact that Article 9 of the Agreement grants the tax concessions without explicit conditions, the Court in *Ettwein* did not see a need to address the question. Hence, *Ettwein* does not give answers to the following questions:
- Are the grounds of justification indeed limited to reasons of public order, security and health explicitly listed in Article 5(1) of Annex I,[47] as implied by *Graf and Engel*?[48]
- What role could Article 21(3) of the Agreement[49] play in the context of discriminations, especially with regard to fiscal supervision?
- Whether the Court would accept "unwritten" justifications based on the "rule of reason" within the scope of the Agreement, as it does in intra-EU cases of covert discriminations or restrictions?

IV. The Statement

20. The Confédération Fiscale Européenne welcomes this judgment, which in essence confirms the extension of intra-EU case law on free movement of individuals to relations between the European Union and Switzerland falling under the scope of the Agreement signed on 21 June 1999 and including the situations of self-employed and employed frontier workers.

21. The Confédération Fiscale Européenne also welcomes the application of the Agreement in cases where the taxpayer's residence and his place of business are in different States, regardless of which nationality of the Contracting Parties is held.

22. The Confédération Fiscale Européenne supports the view that proof provided by taxpayers may be sufficient for purposes of fiscal supervision so that there is no need to rely on exchange of information or justify a discrimination based on the non-existence of such exchange of information.

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[46] It might be noted that German legislation does not establish exchange of information as a prerequisite for the application of § 1(3) EStG, which allows non-resident EU- and EEA-nationals to be treated as residents in line with the *Schumacker*-principle, but rather only requires that the amount of income that is not subject to German income taxation is substantiated through a certificate of the foreign tax administration.

[47] Article 5 of Annex I, entitled "Public order", provides in paragraph 1:
"1. The rights granted under the provisions of this Agreement may be restricted only by means of measures which are justified on grounds of public order, public security or public health."

[48] ECJ, 6 October 2011, Case C-506/10 *Graf and Engel* [2011] ECR I-0000, para. 33, according to which the grounds for justifications for a derogation from the fundamental rules (such as the principle of equal treatment) are "exhaustively listed in Article 5(1) of Annex I to the Agreement" and "must be interpreted strictly".

[49] Article 21 of the Agreement deals with the "Relationship to bilateral agreements on double taxation" and provides in its paragraph 3:
"3. No provision of this Agreement shall prevent the Contracting Parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under their national tax legislation or agreements aimed at preventing double taxation between Switzerland, of the one part, and one or more Member States of the European Community, of the other part, or any other tax arrangements."