EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure

by the

EUROPEAN COMMISSION

represented by Wim ROELS, Legal Adviser, and Cvetelina GEORGIEVA, Member of its Legal Service, Acting as agents, with a postal address for service in Brussels at the Legal Service, *Greffe contentieux*, BERL 1/169, 200, rue de la Loi, 1049 Brussels, and consenting to service by e-EFTACourt,

in Case E-11/22

RS v Steuerverwaltung des Fürstentums Liechtenstein

in which the Verwaltungsgerichtshof (des Fürstentums) ("the Referring Court") has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation of Articles 3, 4 and 28(2) of the Agreement on the European Economic Area ("EEA Agreement" or "EEA").

1. FACTS AND QUESTION REFERRED

1. The applicant in this case is a German national residing in Switzerland and working in Liechtenstein for the Liechtenstein public service. As a non-resident in Liechtenstein, during the relevant tax period from 1 January 2019 to 31 December 2019, the applicant was subject to limited tax liability in Liechtenstein in line with the Double Tax Convention between Liechtenstein and Switzerland (DTC) in respect of income he earned from employment in Liechtenstein.

2. He argues that he was discriminated against, since as a non-resident he was subject to higher tax rate on his earned income compared to persons who are resident in Liechtenstein.

3. For the tax year at issue in the present case, the legislation of Liechtenstein in force provided that persons with limited tax liability, i.e. non-residents, were no longer subject to municipal surcharge (between 150% and 180% depending of the municipality), like the residents of Liechtenstein, but to a surcharge, which was a supplementary national tax. For earnings from activity as an employed person such a surcharge was fixed at 200% for non-residents.

4. This meant that non-residents with limited tax liability, such as the applicant, were subject to a higher tax rate for earnings from their activity as an employed person compared to taxable persons who are resident in Liechtenstein.

5. On 1 September 2020, the Staatsgerichtshof ruled in a case brought by an Austrian national resident in Austria and employed in the public service in Liechtenstein, that Article 23(5)(b) of the Tax Act in the 2014 version discriminates against nationals of an EEA Member State who are subject to limited tax liability in Liechtenstein in respect of income which they earn from employment in Liechtenstein and therefore infringes the principle of non-discrimination set forth in Articles 4 and 28(2) of the EEA Agreement.

6. In this same judgment the Staatsgerichtshof annulled Article 23(5)(b) of the Tax Act in the 2014 version but deferred the operative part of the annulment by one year on the ground that action was needed by the legislature to avoid legal uncertainty and results that are questionable from the perspective of legal policy.

7. The legislature used the one year granted by the Staatsgerichtshof to amend the annulled provision and make it non-discriminatory. However, the entry into force of the amended legislation was set at the day after the promulgation. Its application commences only to assessments for the 2021 tax year which are carried out after its entry into force.

8. Cconsequently, for the tax years 2019 and 2020, as well as for any of the tax years after 2014, the provision which has been held contrary to Articles 4 and 28(2) EEA Agreement remains in force depriving taxpayers in the same situation as the Austrian applicant in the original case ruled by the Staatsgerichtshof from an effective remedy.

9. The Administrative Court of Liechtenstein requests an advisory opinion of the EFTA Court to the following question:

> *"Must Articles 3, 4 and 28(2) of the EEA Agreement be interpreted as precluding the application of a higher tax rate to the taxation of earnings gained by activity in Liechtenstein as an employed person by nationals of an EEA Member State who are not resident for tax purposes on national territory (Liechtenstein), compared to persons liable to tax who are resident for tax purposes on national territory (Liechtenstein), when assessing taxes in respect of the tax years up to 2020, insofar as they have not yet been finally assessed?"*

2. LAW

2.1. EEA law

10. Article 3 EEA reads:

> *"The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement."*

11. Article 4 EEA provides:

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

12. Article 28 EEA provides:

"1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of EC Member States and EFTA States for this purpose; (c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers."

2.2. National law

Gesetz über die Landes- und Gemeindesteuern of 23 September 2010 (Tax Act) ([1])

13. Article 6, par. 2 and 5, of the Tax Act provides:

"(2) Natural persons who are neither domiciled nor habitually resident on national territory are subject to limited tax liability on their national assets and earnings."

"(5) The following shall be regarded as earnings within the territory referred to in paragraph 2:

[...]

c) earnings from salaried employment within the meaning of Article 14(2)(d) and substitute income within the meaning of Article 14(2)(f), which are connected with a national employment relationship and are provided by a national insurance scheme."

([1]) Landesgesetzblatt (LGBl.) 2010 No 340.

14. Article 19 of the Tax Act provides:

"The national tax shall be calculated on the basis of the taxable earnings, including the assets converted into earnings in accordance with Art. 14, para. 2, subpara. l. The national tax shall be calculated on the basis of the taxable earnings. Subject to Art. 15, para. 2, subpara. i, Art. 21 and 22, it shall be (x) for taxable earnings: [...]."

15. Article 75 of the Tax Act provides:

"(1) With reservations to para. 2, a surcharge shall be levied as a municipal tax in addition to the national tax on wealth and earnings, including the dedication tax in accordance with Art. 13; this shall also apply to taxation according to expenditure in accordance with Art. 33.

(2) No surcharge shall be levied in the case of tax deduction at source in accordance with Art. 25.

(3) The amount of this surcharge shall be fixed each year by the municipal council as a percentage of the national tax, but shall not be less than 150% and shall not exceed 250%.

(4) The surcharge shall be levied together with the national tax."

16. Article 23 of the Tax Act provides:

"Special provisions in cases of limited tax liability.

[...]

(5) The municipal surcharge shall be levied:

[...]

b) in the case of earnings under Article 6(5)(c), the municipal surcharge of the municipality in which the activity is carried out; [...]"

Act of 4 September 2014 amending the Tax Act ([2])

17. Article 23 provides:

"(5) For the ordinary assessment, the tariff according to Art. 19 shall be applied and the following surcharge shall be levied:

(a) in the case of earnings under Article 6(5)(a), (b) and (g), the municipal surcharge of the municipality in which the land or permanent establishment is situated;

(b) in other cases, a surcharge of 200 %."

Act of 11 June 2021 amending the Tax Act ([3])

18. This Act amends the Tax act as follows:

"I. Amendment of existing law:

The Gesetz über die Landes- und Gemeindesteuern of 23 September 2010 (Tax Act), LGBl. 2010 No 340, in the applicable version, shall be amended as follows:

Article 23(5)(b)

5. For the ordinary assessment, the scale under Article 19 shall be applied and the following surcharge shall be levied:

(b) in other cases, a surcharge to be laid down each year in the Finance Act."

19. In addition it provides the following transitional provisions and rules for its entry into force:

"II. Transitional provision:

For the 2021 tax year the surcharge under Article 23(5)(b) shall be 150%.

III. Entry into force:

This Act shall enter into force on the day after promulgation and apply for the first time to assessments for the 2021 tax year which are carried out after its entry into force."

([2]) LGBl. 2014 No 344.

([3]) LGBl. 2021 No 256.

3. ANALYSIS

20. In order to answer the question referred, it is necessary to first analyse whether or not the applicable law did in fact violate the articles 4 and 28(2) EEA Agreement, since it is this applicable law that continues to apply up to the assessments for the tax year 2021.

Does Article 23(5)(b) of the Tax Act in the 2014 version violate EEA law?

21. As mentioned in point 5 above, the Staatsgerichtshof of the Principality of Liechtenstein annulled Article 23(5)(b) of the Tax Act in the 2014 version on the grounds that it discriminates against nationals of an EEA Member State who are subject to limited tax liability in Liechtenstein in respect of income which they earn from employment in Liechtenstein ([4]).

22. The applicant, who was a non-resident subject to limited tax liability in Liechtenstein, was not entitled to a lower tax rate on his earned income, to which he would have been entitled had he been a resident in Liechtenstein during the relevant tax period.

23. Since the applicant works in the Liechtenstein public service, it is relevant to note that the exception provided by Article 28(4) EEA Agreement is not applicable to the situation of the applicant since such derogation is confined to restricting the admission of non-nationals into the public service and therefore it does not permit discrimination in terms and conditions of employment once they are admitted in the public service ([5]).

24. As the referring court correctly states, the applicant being a German national working in the Liechtenstein public service may rely on the free movement of workers provided for in the EEA Agreement.

([4]) Cf. request for advisory opinion, page 3.

([5]) This exception is mirroring Article 45, par. 4, TFEU. Cf. Judgment of 12 February 1974, Sotgiu, 152/73, EU:C:1974:13, paragraph 4.

25. It is also clear that the status of residence or non-residence is irrelevant where it concerns the determination of the rate of tax ([6]), given that there are no obvious reasons to levy a higher rate of tax on a non-resident ([7]).

26. The Commission therefore agrees with the assessment of the Staatsgerichtshof that the applicable law violates the free movement of workers as guaranteed by article 28 of the EEA Agreement in so far as it taxes a non-resident worker in Liechtenstein more heavily than a resident worker by subjecting him to a higher tax rate. There do not seem to be any justifications for such a discriminatory treatment.

27. The same reasoning can also be applied to Article 4 EEA Agreement.

28. This also appears to be the view of the referring court, which recognizes that for the 2019 tax year there is an infringement of the principle of non-discrimination under Articles 4 and 28(2) of the EEA agreements.

Consequence of a finding a breach of Articles 4 and 28(2) EEA Agreement

29. Now that it is established that indeed Article 23(5)(b) of the Tax Act in the 2014 version is contrary to Articles 4 and 28(2) EEA Agreement, the applicant would therefore in principle be entitled to a taxation which is non-discriminatory, i.e. which is not higher than what a resident would have had to pay ([8]).

30. It emerges from the factual descriptions provided by the referring court that the tax proceedings concerning the applicant's 2019 tax return have not yet been closed by reason of the applicant's decision to contest the authorities' tax assessment for that year. In this regard, the applicant's position is different from those taxpayers who are otherwise in a similar tax situation but who have not decided to contest the tax assessment by the tax authorities.

([6]) E.g. judgments of 27 June 1996, Asscher, C-107/94, EU:C:1996:251, paragraph 62; of 12 June 2003, Gerritse, C-234/01, EU:C:2003:340, paragraph 54.

([7]) The issue of residence can be important, however, in other aspects such as the taking into account the ability to pay (e.g. the taking into account of personal and family circumstances as in the Schumacker line of case law) or the use of a different technique to levy the tax (e.g. the recourse to a withholding tax for non-residents only).

([8]) E.g. judgment of 9 July 2014, Fred Olsen, joined cases E-3/13 and E-20/13, paragraph 137 and case law cited.

31. Given that the tax proceedings concerning the applicant's tax return for the tax year 2019 has not yet been closed, the referring court is therefore capable, competent and indeed obliged under EEA law to ensure that the applicant is taxed in a non-discriminatory manner as a result of the dispute which is pending before it.

32. Indeed, a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means ([9]).

33. It is not clear whether the applicant has paid the higher tax due following the tax assessment by the authorities or whether he has not done so. If the applicant has not yet paid the tax which was due, he should not still be compelled to do so. If the applicant has already paid the tax which was due but contrary to EEA law, the applicant is entitled to a reimbursement ([10]) plus interest ([11]).

Incidence of the deferral of the annulment of Article 23(5)(b) by the Staatsgerichtshof

34. The Staatsgerichtshof found that Article 23(5)(b) of the Tax Act in the 2014 version discriminates against nationals of an EEA Member State who are subject to limited tax liability in Liechtenstein in respect of income which they earn from employment in Liechtenstein and therefore infringes the principle of non-discrimination set forth in Articles 4 and 28(2) of the EEA Agreement. It annulled Article 23(5)(b) of the Tax Act in the 2014 version, although with a deferral for one year.

35. The finding of the Staatsgerichtshof that Article 23(5)(b) of the Tax Act in the 2014 version is contrary to the State Treaty is identical to the finding that this provision is in breach with EEA law, the consequences however are different. It appears that under the national law it is possible to defer the effect of an annulment of a piece of

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([9]) Judgment of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraph 24.

([10]) Judgment of 16 December 2013, Creditinfo Lánstraust hf., E-7/13, paragraph 43.

([11]) Judgment of 19 September 2017, Commission v. Ireland, C-552/15, EU:C:2017:698, paragraph 117. See also judgment of 8 March 2001, Metallgesellschaft & Hoechst, C-397/98 & C-410/98, EU:EC:2001:134, paragraphs 86-88.

national legislation that is contrary to the EEA Agreement. However, under EEA law, in particular in respect of directly applicable EEA law such as articles 4 and 28(2) EEA Agreement, a deferred annulment is not the appropriate consequence for such a finding.

36. This would be in clear contradiction with the settled case law, which requires an effective remedy. In the case of taxes levied in breach of rules of EEA law, the right to a refund of such taxes paid is the consequence and complement of the rights conferred on individuals by provisions of EEA law prohibiting such taxes, as interpreted either by the EFTA Court or by a national court. The EEA States are therefore in principle required to repay taxes levied in breach of EEA law ([12]).

37. If a piece of national legislation is interpreted as contrary to EEA law such interpretation is held to be valid as *ex tunc*. The referring court has provided no concrete reasons capable of overriding such effective application of the EEA agreement and the Commission was not capable to identify such reasons from the request for advisory opinion.

38. It must therefore be concluded that the deferral of the annulment of Article 23(5)(b) in its 2014 version does not detract from the obligation of the referring judge to provide an effective remedy to the applicant in the case pending before it and does not justify an exception from the effective application of Articles 4 and 23(4) of the EEA-agreement.

39. How the referring judge assures the non-discriminatory taxation for the year 2019 is to be decided in accordance with national law and national procedures (i.e. the principle of procedural autonomy) provided, first, that such rules are not less favourable than those governing similar domestic actions (i.e. the principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Union or EEA law (i.e. the principle of effectiveness) ([13]).

([12]) Judgment of 6 October 2015, Târşia, C-69/14, EU:C:2015:662, paragraph 24.

([13]) Judgments of 13 June 2013, Beatrix Koch, E-11/12, paragraph 117; of 8 March 2001, Metallgesellschaft & Hoechst, C-397/98 & C-410/98, EU:EC:2001:134, paragraph 85.

Incidence of transitional provision and the entry into force of the amended Article 23(5)(b)

40. The entry into force of the amended Article 23(5)(b) Tax Act was set at the day after the promulgation and its application commences only to assessments for the 2021 tax year which are carried out after its entry into force.

41. This deferred application taken together with the decision of the Staatsgerichtshof to defer the operative part of the annulment of Article 23(5)(b) Tax Act in the 2014 version, results in a continued application of the 2014 version of Article 23(5)(b) Tax Act for the years 2020 and previous years, including 2019 which is the tax year for which the applicant contests the authorities' tax assessment.

42. The Act of 11 June 2021 amending Article 23(5)(b) Tax Act is therefore, where it concerns tax years prior to its entry into force and its date of first application, a conflicting provision of national legislation, even if adopted subsequently for which it is not necessary for the national court to request or await the prior setting aside of such a provision by legislative or other constitutional means ([14]).

43. It is therefore the position of the Commission that the referring court, in ruling on the dispute pending before it, must ensure the full application of EEA law and disregard any national legislation which may interfere with such full application.

On the argument of legal certainty

44. The argument put forward by the referring judge that "*it would be discriminatory and unfair and unjust for all those taxable persons whose tax assessments for the past tax years were concluded on 20 August 2021 if a lower tax rate for the past tax years was now applied retrospectively to the few taxable persons, like the applicant*" is therefore not valid in the applicant's case, as has been developed above.

45. Indeed, to put it very simply, this would mean that since it is now known that the law discriminated in the past for taxpayers in the fiscal year 2019, rather than remedying such discrimination it is proposed to continue such discrimination for fear of discriminating within the discriminated group. Such argument cannot prosper. Furthermore, there cannot be any legitimate expectations in the persistence

([14]) Idem.

of an illegal situation. There is also no right to equal treatment that would perpetuate an illegal situation.

46. Legal certainty could only be taken into consideration when the tax situation of a taxpayer has become final and no further challenges in the normal course of proceedings are possible, for instance, because the taxpayers have renounced to contest the authorities' tax assessment or the reopening of a very large number of cases would pose an impossible or disproportionate burden on the tax authority ([15]). It cannot be taken into account however as long as the tax proceedings are still open for challenge, since in such a case the administration or the competent judge will still have to apply EEA law directly applicable to the taxpayers contesting the tax assessment.

47. While Union or EEA law does not impose any limit in time for making an application for review of an administrative decision that has become final, it is established case-law that Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Union or EEA principles of effectiveness and equivalence ([16]).

48. As regards the reopening of the finally assessed tax proceedings, it shall be pointed to the established case-law of the CJEU that *"[l]egal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way." ([17])*

49. However, the CJEU has also held that *"[...] specific circumstances may be capable, by virtue of the principle of cooperation arising from Article 10 EC ([18]), of requiring a national administrative body to review an administrative decision that has become*

([15]) Judgment of 8 April 1976, Defrenne, Case 43-75, EU:C:1976:56, paragraph 69-72.

([16]) Judgments of the Court of 12 February 2008, Willy Kempter KG, C-2/06, EU:C:2008:78, paragraph 60; of 16 December 1976, Rewe-Zentralfinanz, Case 33/76, EU:C:1976:188, paragraph 5.

([17]) Judgments of 13 January 2004, C-453/00, *Kühne & Heitz NV*, EU:C:2004:17, paragraph 24; of 12 February 2008, C-2/06, *Willy Kempter KG*, ECLI:EU:C:2008:78, paragraph 37.

([18]) Current Article 4(3) TEU.

final following the exhaustion of domestic remedies, in order to take account of the interpretation of a relevant provision of Community law given subsequently by the Court." ([19])

50. Thus, it could be argued that the principle of sincere cooperation as provided under Article 3 EEA might even require that in very specific circumstances the finality of administrative decisions should be reconsidered. This would be even more so in a case when the EEA provision at stake is a fundamental freedom guaranteed by the EEA agreement itself.

51. The Commission however points out that this is not the case of the applicant, since his tax proceedings for the year 2019 has never been finalized.

52. The referring court refers to a line of case law of the CJEU where it is said, "the Court alone may, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the effects of a rule of EU law with regard to a national law that is contrary to it" (emphasis added) ([20]). As for all exceptions under EEA law, these must be interpreted strictly ([21]).

53. Examples can be found in a number of areas of Union law and EEA law.

54. In the area of environmental protection, such an exceptional suspension of the effects of a rule of EU law with regard to national law that is contrary to it was allowed only given a number of strict conditions. More specifically, these conditions were meant to ensure that the annulment of the national law did not result in a situation, which would be worse ("*more harmful to the environment*") from the perspective of the objective of applicable Union legislation, in that case environmental protection ([22]).

([19]) Judgment of 12 February 2008, *Willy Kempter KG*, C-2/06, EU:C:2008:78, paragraph 38. See also judgments of 13 January 2004, C-453/00, Kühne & Heitz NV, EU:C:2004:17, paragraph 27 and of 19 September 2006, i-21 Germany and Arcor, joined cases C-392/04 and C-422/04, EU:C:2006:586, paragraph 52.

([20]) Judgment of 17 March 2021, UH, C-64/20, EU:C:2021:207, paragraph 36.

([21]) Judgment of 21 April 2021, Norway v. L., E-2/20, paragraph 31. For previous case law, see Judgments of 22 July 2013, Jan Anfinn Wahl, E-15/12, paragraphs 83 and 117; of 18 June 2021, ADCADA Immobilien AG PCC in Konkurs, E-10/20, paragraph 47, of

([22]) Judgments of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraph 38 ; of 28 February 2012 in Inter-Environnement Wallonie and Terre wallonne (C-41/11, EU:C:2012:103, paragraphs 58-62.

55. The situation in the case referred here appears to be different from the situation in environmental law in that the absence of the tax provisions that were found to be contrary to the EEA-agreement can be easily replaced by the national tax authorities through the imposition of a tax that is equivalent to that of a national of Liechtenstein.

56. This approach is confirmed in another context entirely, the context of betting monopolies. In this case, the German legislation providing for a betting monopoly was held to be contrary to the freedom of establishment and the freedom to provide services. The German Bundesverfassungsgericht however had held that the existing legal situation could be provisionally maintained only on the condition that a minimum of consistency be established between the objective seeking to limit the passion for gambling and combat addiction to it, and the effective exercise of the monopoly. The CJEU however ruled that by reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, and therefore cannot continue to apply during a transitional period ([23]).

57. If these precedents are applied to the case at hand, the Commission does not see which objective under EEA law would be served by the continued application of the national legislation held contrary to EEA law. Quite to the contrary, the effect of the continued application of the national law simply causes more unlawful taxation for a longer period of time.

58. In addition, also where it concerns the application of the interpretation of Union or EEA law to past situations, it is settled case law that a restriction on the possibility for any person concerned to rely on a provision interpreted by the CJEU or the EFTA Court may be permitted only in the actual judgment ruling on the interpretation sought ([24]).

([23]) Judgment of 8 September 2010, Winner Wetten, C-409/06, EU:C:2010:503, paragraphs 66 to 69.

([24]) Judgments of 22 June 2021, Latvijas Republikas Saeima, C-439/19, EU:C:2021:504, paragraph 133; of 6 March 2007, Meilicke, C-292/04, EU:C:2007:132, paragraphs 36 and 37.

59. An early example thereof was the well-known *Defrenne* case which concerned the principle of equal pay for equal work, where the CJEU held, when ruling on the temporal effects of the judgment, that in circumstances, where "*the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.* ([25])" Consequently, the CJEU limited the direct effect of then Article 119 EEC, now article 157 TFEU, so that it could not be relied on in claims concerning pay periods prior to the date of its judgment, except as regards those workers who had already brought legal proceedings or made an equivalent claim ([26]).

60. However, here the considerations of legal certainty at issue in the *Defrenne* case are not comparable to those at issue in this present case, where it is simply a case of reimbursement of tax unduly paid and normal rules as regarding remedies are to be applied to the applicant and any other person in the same situation.

61. It can incidentally be pointed out that also in the *Defrenne* case, even in the exceptional circumstances of the labour market, the Court did not accept a justification for reasons of legal certainty for "*those workers who had already brought legal proceedings or made an equivalent claim*" ([27]).

([25]) Judgment of 8 April 1976, Defrenne, Case 43-75, EU:C:1976:56, paragraph 74.

([26]) Case 43-75, Defrenne, paragraph 75.

([27]) Idem.

4. CONCLUSION

62. In the light of the foregoing, the Commission considers that the questions referred to the Court of Justice for a preliminary ruling by the Verwaltungsgerichtshof (des Fürstentums) should be answered as follows:

> Articles 3, 4 and 28(2) of the EEA Agreement are be interpreted as precluding the application of a higher tax rate to the taxation of earnings gained by activity in Liechtenstein as an employed person by nationals of an EEA Member State who are not resident for tax purposes on national territory (Liechtenstein), compared to persons liable to tax who are resident for tax purposes on national territory (Liechtenstein), when assessing taxes in respect of the tax years up to 2020, insofar as they have not yet been finally assessed.

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