Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 February 2016 [1]

Case C-300/15

Charles Kohlland
Sylvie Kohll-Schlesser
v
Directeur de l'administration des contributions directes(Request for a preliminary ruling

from the Tribunal administratif du Luxembourg (Luxembourg))

(Free movement of persons — Worker — Equal treatment — Income tax — National pensions and pensions acquired in another Member State — Tax credit reserved to certain pensions — Tax deduction document issued by the national authority)

1. The Court's body of case-law on direct taxation is ceaselessly expanding, despite already having reached a considerable size and even though it usually refers only to the fundamental freedoms recognised by the Treaty (also 'TFEU'). The present request for a preliminary ruling concerns the compatibility with EU law of Luxembourg legislation which, in amending income tax, grants a tax credit to pensioners who satisfy certain conditions.

2. In order to answer the question referred by the Tribunal administratif du Luxembourg, it will be necessary to analyse the effect of freedom of movement for workers on a Member State's system of direct taxation. It will also be necessary to clarify the criteria applicable to income received by pensioners who have made use of that freedom, either as a result of Article 45 TFEU, relating to workers, or as a result of the general provision, Article 21 TFEU. Lastly, the Court's reply must serve, if possible, to define further the limits of the examination of national measures restricting freedom of movement and, in particular, any justification for such measures.

I – **National legal framework**

A –*Luxembourg law*

3. It is apparent from the order for reference that, in accordance with Article 139*ter*(1) of the amended Law of 4 December 1967 on Income Tax (Loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, 'the LIT'), in the version applicable to earnings in 2009 and subsequent years, pensioners' tax credit is to be granted to all taxpayers in receipt of income arising from pensions or annuities within the meaning of Article 96(1)(1) and (2) of the LIT which Luxembourg has the right to tax and in possession of a tax deduction document.

1 — Original language: Spanish.

4. Similarly, under Article 139*ter*(2) of the LIT, the tax credit is imputable and refundable to the pensioner exclusively in the context of the deduction of tax from wages and salaries as carried out by the pension fund or any other body liable for payment of the pension, on the basis of a tax deduction document.

5. Further, according to the referring court, the parliamentary documents relating to Draft Law No 5924[2] show that tax credits for employed persons and pensioners were incorporated in the provisions concerning the deduction of tax from wages and salaries, so that those tax credits are paid to employed persons and pensioners solely through employers, pension funds and other persons liable for payment of pensions on the basis of the entries made in the tax deduction document.

6. For its part, Article 19 of the Convention for the avoidance of double taxation ('DTC') between Luxembourg and the Netherlands is worded as follows:

'Subject to the provisions of Article 20(1), pensions and other similar remuneration paid to a resident of one of the States in respect of past gainful employment shall be taxable only in that State.'

II –Facts of the case and proceedings before the national court

7. The case before the referring court concerns two pensions of Netherlands origin, paid to Mr Kohll, and taxable in Luxembourg: the first is paid directly by Shell International B.V., an undertaking for which Mr Kohll worked for several years, while the second is paid by the Sociale Verzekeringsbank ('the SVB').[3]

8. Given that the two Netherlands pensions had not been subject to deduction at source in Luxembourg, Mr Kohll was not granted pensioners' tax credit for the three years at issue in the main proceedings, that is to say, 2009, 2010 and 2011.

9. On 20 February 2013, Mr Kohll lodged an administrative complaint with the Directeur de l'administration des Contributions directes ('the Directeur')[4] against the income tax notice for the year 2009, issued on 9 June 2010, and the income tax notices for the years 2010 and 2011, both issued on 6 February 2013.

10. By decision of 23 September 2013, the Directeur declared the complaint against the income tax notice for 2009 inadmissible for being out of time and rectified *in pejus* the income tax notices for the years 2010 and 2011. The Directeur took the view, inter alia, that since the complainant received pensions not subject to deduction at source in Luxembourg, he was not entitled to a tax credit for pensioners under Article 139*ter* of the LIT for the years 2010 and 2011.

11. The documents before the Court show that the Tribunal administratif ruled inadmissible, because vitiated by a procedural defect, the action brought by Mrs Kohll-Schlesser, the applicant's wife, in relation to her own pension paid by the SVB, which she had received in the years at issue. That complaint is no longer the object of proceedings.

2 — It should be understood that, following its adoption as the Law of 19 December 2008, that law amended the rules governing tax credits in the manner in dispute in these proceedings.

3 — The SVB is the organisation in charge of national insurance in the Netherlands. It manages, among other benefits, the basic State pension, to which everyone is entitled who has reached retirement age and resides or has resided in that Member State.

4 — Body of the Luxembourg tax authorities with responsibility, inter alia, for dealing with complaints against tax assessments relating to direct taxes.

12. The applicant claimed in the proceedings before the Tribunal administratif that refusing to grant tax credits to persons whose pensions are not subject to deduction at source in Luxembourg excludes those whose pensions are not subject to that deduction, thereby restricting the grant of tax credits to persons receiving their pension from a pension fund in Luxembourg. In that connection, the applicant was doubtful whether the legislature had the intention in 2008, the year when the LIT was amended in the manner at issue, of disqualifying from entitlement to the tax credit pensioners resident in Luxembourg but whose income comes from pension rights acquired with and paid by foreign pension funds. The applicant contended that that interpretation constitutes an infringement of, inter alia, the freedom of movement for persons (workers) affirmed in Article 45 TFEU.

13. For her part, the Government representative submitted that Article 139*ter* LIT does not raise any difficulties in relation to freedom of movement for workers within the meaning of Article 45 TFEU. She contended that Mr Kohll had not suffered any discrimination, given that the difference in his situation was a consequence of the characteristics of the tax credit regime introduced by the legislature.

14. The Government representative went on to state that that difference was objectively justified in the light of the aim pursued by the provision. Nor did she consider that there was any interference with the free movement of persons safeguarded by Article 21 TFEU, for the national legislation at issue does not affect freedom of movement, inasmuch as it does not place any obstacle in the way of residence in another Member State.

15. The Tribunal administratif states that, in making the grant of the tax credit subject to the condition that the taxpayer must be in possession of a tax deduction document, Article 139*ter* LIT could lead to indirect discrimination, even though it does not involve any condition relating to the nationality of potential beneficiaries. That view is supported by the fact that the tax credit in question is not granted to persons in receipt of pensions not subject to deduction at source in Luxembourg, such as pensions from abroad.

16. In those circumstances, the referring court states that, in view of the difficulty in interpreting Article 139*ter* LIT and for want of Community case-law resolving a legal issue of a similar nature, it has decided to seek a preliminary ruling from the Court of Justice on the following question:

‘Does the principle of freedom of movement for workers, as affirmed, in particular, in Article 45 TFEU, preclude the provisions of Article 139*ter*(1) of the amended Law of 4 December 1967 on tax in so far as they restrict eligibility for the tax credit established therein to persons in possession of a tax deduction document?’

III –**Procedure before the Court of Justice and arguments of the parties**

A –*Procedure*

17. The order for reference was received at the Court Registry on 19 June 2015.

18. Only the Luxembourg Government and the European Commission submitted written observations within the period mentioned in Article 23 of the Statute of the Court of Justice.

19. No hearing was held, none of the parties mentioned having requested one.

B –*Summary of the arguments submitted*

20. The Luxembourg Government is doubtful whether this case can fall within the ambit of freedom of movement for workers. It submits that the provisions at issue neither prevent nor deter the nationals of a Member State from leaving their State of origin in order to exercise their right to freedom of movement. However, the Luxembourg Government puts forward a series of observations in the alternative in case the Court should rule otherwise.

21. In that connection, the Luxembourg Government states that the legislation at issue does not affect all income from pensions but only income subject to the tax deduction, which is the consequence of the inherent features of the tax credit. In that respect, the Luxembourg Government explains that pension funds generally pay the tax credit to pensioners at the end of each month. For that purpose, the law permits the pension funds to offset tax credits against positive deductions so that the tax deduction actually applied is equivalent to the result of subtracting the tax credit from the gross amount of the deduction.

22. The Luxembourg Government goes on to argue that, accordingly, Article 139*ter* LIT falls within the strict framework of tax deduction, and the tax credit must be imputed, or, where appropriate, refunded, exclusively in relation to income from pensions to which the tax deduction procedure is applied. Therefore, the Luxembourg Government submits that making the grant of the tax benefit conditional on the attachment by the beneficiary of a tax deduction document does not constitute a restriction of the free movement of workers or a restriction of the free movement of persons protected by Article 21 TFEU.

23. In the alternative, should the Court find that the national provision at issue restricts the free movement of workers or, more widely, of persons, the Luxembourg Government has submitted arguments intended to justify that restriction. These may be summed up as two main arguments.

24. In the first place, the Luxembourg Government contends that the restriction of freedom of movement is a consequence of the characteristics of the tax credit as devised by the legislature, inasmuch as pension funds, having at their disposal the data required for the keeping of tax deduction document, are in the best position both to grant the tax credit and to impute it or refund it directly and effectively. Seen in that light, it is, therefore, the only viable system and does not have disproportionate effects on tax authorities, pension funds and others liable for payment of the tax credit, or on taxpayers.

25. In the second place, the Luxembourg Government submits that the system is justified by considerations of general interest deriving from the link between the system for collection of the tax (deduction at source) and the application of the pensioners' tax credit, which is in its view an essential element if the coherence of the tax system is to be maintained. The Luxembourg Government contends that Article 139*ter* is proportionate for the purposes of attaining the objective pursued by the LIT and that there are no less restrictive measures for obtaining the same result.

26. According to the Commission, the order for reference does not contain sufficient facts to enable the provision of EU law potentially infringed by Article 139*ter* of the LIT to be clearly identified. Specifically, the Commission thinks it unfortunate that it should not be known whether Mr Kohll returned to Luxembourg from the Netherlands to seek or to take up employment before retiring, in

which case he would be able to rely upon Article 45 TFEU,[5] or whether he returned to his country of nationality because he wished to settle in Luxembourg when his working life ended, in which case he would be able to rely upon the right of freedom of movement for persons laid down in Article 21 TFEU.[6]

27. In those circumstances, and given the similarity in the reasoning applicable to the analysis of whether there has been infringement of the two articles of the TFEU, the Commission proposes a joint examination at the end of which it concludes that both provisions preclude national legislation like that at issue in the present proceedings.

28. The Commission submits that there is a restriction both of the rights conferred by Article 45 TFEU and of those conferred by Article 21 TFEU because, as is required by the case-law of the Court,[7] it considers that Mr Kohll's situation is comparable to that of a taxpaying pensioner receiving income from a pension fund established in Luxembourg.

29. In the light of the preamble to the Law of 19 December 2008, the purpose of Article 139*ter* of the LIT is to assist those who are most disadvantaged, including all pensioners, by increasing their available income. The Commission argues that that purpose may be achieved for all pensioners resident in Luxembourg, whether they receive their pension from funds or other institutions liable for payment established in Luxembourg or receive their pension from another Member State and pay tax in Luxembourg under the terms of double taxation conventions.

30. However, in disqualifying the latter from receipt of the tax credit, the provision at issue leads to unequal treatment which: (a) could discourage employees from taking up a post in another Member State and acquiring pension rights there and (b) gives rise to a disadvantage for pensioners settling in Luxembourg, by penalising them for merely exercising their freedom of movement to another Member State.

31. The Commission argues that it is precisely because it disqualifies resident pensioners whose income is taxable in Luxembourg from receipt of the tax credit that the national legislation at issue is not apt to attain the general interest objective it pursues. In that respect, the Commission observes that the tax credit is applied irrespective of the amount of the pension, except for pensions of below EUR 300 per year or EUR 25 per month, from which it follows that it is not specifically intended for the most economically and socially vulnerable population groups. Therefore, resident taxpayers who receive a pension from another Member State but who pay tax in Luxembourg, however modest the sum, do not benefit from the tax credit because they are not subject to withholding tax in that country. The criterion linking the allowance (the tax credit) to the place of origin of pensions taxable in Luxembourg is not, therefore, even appropriate to the objective pursued by national law.

32. Nor, according to the Commission, can the provision at issue be justified on practical grounds of an administrative nature. In particular, the Commission observes that the credit could be granted to pensioners at present excluded, enabling them to deduct it from their tax at the time it is calculated, using the method of assessment of the taxable amount, without any of the disproportionate difficulties arising for the tax authorities, pension funds and taxpayers to which the Luxembourg Government refers.

5 — The Commission refers in that connection to the judgments in *Bachmann* (C-204/90, EU:C:1992:35, in particular 9 thereof), and *Commission* v *Denmark* (C-150/04, EU:C:2007:69, paragraph 41).

6 — The Commission cites the judgments in *Turpeinen*, C-520/04, EU:C:2006:703, paragraph 16, and *Rüffler* (C-544/07, EU:C:2009:258, paragraph 56 and the case-law cited therein).

7 — Judgment in *Papillon* (C-418/07, EU:C:2008:659, paragraph 27).

33. In addition, the Commission submits that the necessity of preserving the coherence of the tax system offers no possible justification either, given that no direct link may be discerned between the disputed tax credit and the offsetting of that tax benefit by a particular tax levy. [8]

34. Lastly, the Commission submits that justification based on its being necessary to safeguard the balanced allocation of powers of taxation between the Member States may not be relied upon, [9] in view of the fact that, in these proceedings, Luxembourg has tax jurisdiction over pensions from the other Member State concerned, the Netherlands.

IV – **Analysis of the question**

A – *Preliminary point: the applicable provision of the Treaty*

35. The observations submitted in these preliminary ruling proceedings attest the uncertainty as to the provision that ought to cover Mr Kohll's legal position. The possible options considered are Article 21(1) TFEU, on the freedom of citizens of the Union to move and reside within the territory of the Member States, and Article 45 TFEU, which affirms freedom of movement for workers within the European Union.

36. The Luxembourg Government denies that the conditions for the application of either of those two articles are met, arguing that the legislation at issue is not liable to deter citizens from exercising their right to freedom of movement or prevent them doing so.

37. On the other hand, according to the Commission, uncertainty is engendered by there being no information indicating whether Mr Kohll returned to his country of origin, Luxembourg, in order to take up employment before retiring or whether he settled in his homeland after he had retired. In the first situation, the Commission argues that the case would have to be decided in the light of Article 45 TFEU and, in the second, in the light of Article 21 TFEU.

38. Although I shall give my view on the provision applicable, in practical terms this discussion may prove (or at least appear) unnecessary, for the same methods of interpretation are used to examine both provisions of primary law at issue. Nevertheless, the correct application of a particular provision to the facts of the case can always be useful, for example, as guidance in future cases.

39. The situation of pensioners, as a specific category of persons, is anchored in EU law in the implicit, or oblique, reference made in Article 45(3)(d) to the right of a worker to remain in the territory of a Member State *after having been employed in that State*. That right is now governed by Article 17 of Directive 2004/38, [10] which lays down various exemptions applicable to pensioners and persons unfit for work, reducing the general period of five years of continuous legal residence in the host Member State for citizens of the Union and members of their family as a condition for acquiring a right of permanent residence in that State. However, that legislation is not relevant in the present case, nor is the fundamental right in question laid down in the Treaty exhausted in the event of permanent residence in another Member State.

8 — In that connection, the Commission refers to the judgment in *Heinrich Bauer Verlag* (C-360/06, EU:C:2008:531, paragraphs 37 to 39 and the case-law cited).

9 — See the judgment in *Bouanich* (C-375/12, EU:C:2014:138, paragraphs 81 and 84 to 86).

10 — Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158 p. 77).

40. The facts of the case are covered by the line of case-law in which the right of freedom of movement for workers, protected by Article 45 TFEU, has been relied upon against national legislation governing various spheres, in particular, tax laws, in other words, in contexts other than the right of residence in the host State. The Court has consistently held that migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship. [11]

41. However, pensioners have not always been recognised to have the status of worker that would have enabled them to avail themselves of the specific freedom of movement provided for in Article 45 TFEU. Thus, in *Pusa*, [12] *Turpeinen* [13] and, most recently, *Hirvonen*, [14] tacitly guided, in all likelihood, by the view that the ending of the employment relationship as a rule causes the person concerned to lose the status of worker within the meaning of Article 45 TFEU, [15] the Court declared that that article does not cover persons who have carried out all their occupational activity in their own Member State and who have exercised the right to reside in another Member State only after they have retired, without any intention of working in that State. [16] Those cases were decided by the application of Article 21 TFEU.

42. In short, persons who change their Member State of residence only once their employment relationship has ended are protected under EU law by the right of freedom of movement laid down in Article 21 TFEU, but are not protected under Article 45 TFEU. The reason is that, strictly speaking, when such persons move their place of residence to another Member State, they do not exercise the right of freedom of movement for workers provided for in the Treaty, for they no longer have the status of worker. [17]

43. In short, by having exercised their right to freedom of movement as employed persons, persons who have spent part or all of their working life in a Member State other than their State of origin, and who then return to that State to settle and take up residence without the intention of working there, are entitled to rely upon Article 45 TFEU. [18] However, according to the Court's case-law, the protection afforded by the Treaty in those cases extends only to discrimination and obstacles affecting rights acquired during a person's former employment relationship. [19]

44. In the context of the facts set out in the order for reference, it is apparent that the pension that Mr Kohll receives directly from Shell International B.V., and that constitutes the greater part of his income, is a result of his former employment relationship with that company in the Netherlands. On the basis of the case-law referred to above, it is my view, therefore, that the income from that pension is protected by the freedom of movement for workers laid down in Article 45 TFEU.

45. Unlike the Commission, I believe that the provision of the Treaty applicable to the case can be determined, whether Mr Kohll moved to Luxembourg to take up another post or whether he did so after he had retired. To my mind, given that the pensions at issue relate exclusively to the period of Mr Kohll's life which he spent in the Netherlands, they constitute rights acquired by a worker in the

11 — Judgments in *Meints* (C-57/96, EU:C:1997:564, paragraph 40), and *Martínez Sala* (C-85/96, EU:C:1998:217, paragraph 32 and the case-law cited).

12 — Judgment in *Pusa* (C-224/02, EU:C:2004:273).

13 — Judgment in *Turpeinen* (C-520/04, EU:C:2006:703).

14 — Judgment in *Hirvonen* (C-632/13, EU:C:2015:765).

15 — See the judgment in *Leclere and Deaconescu* (C-43/99, EU:C:2001:303, paragraph 55).

16 — See point 60 of the Opinion of Advocate General Léger in *Turpeinen* (C-520/04, EU:C:2006:332), to which paragraph 16 of the judgment refers.

17 — See, *a contrario*, the settled case-law of the Court, to the effect that '… all the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by European Union nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State' (judgment in *Petersen*, C-544/11, EU:C:2013:124, paragraph 35 and the case-law cited therein).

18 — See the judgment in *Sehrer* (C-302/98, EU:C:2000:322, paragraph 30).

19 — Judgment in *Leclere and Deaconescu* (C-43/99, EU:C:2001:303, paragraph 59).

exercise of his right to freedom of movement and warrant protection under Article 45 TFEU.[20] In those circumstances, it is immaterial to the outcome of the case whether the applicant returned to his Member State of nationality to continue working before his retirement or whether he did so in order to take retirement straight away.

46. It remains to be established whether that reasoning is also applicable to the second pension of the applicant in the main proceedings, that he receives from the SVB. It may be deduced from the order for reference that that pension is a non-contributory pension which the Netherlands State grants to all persons who have resided in the Netherlands, regardless of whether they were in gainful employment in that country.

47. Although it is true that, in the light of the characteristics of the pension from the SVB, no direct link to the employment relationship exists, it is equally true that, in Mr Kohll's case, the sole raison d'être of his SVB pension follows from his employment relationship, albeit indirectly, for the applicant would never have been entitled to that pension had he not resided in the Netherlands because of his employment obligations. Moreover, a separate examination of each of the pensions at issue in accordance with a different article of the Treaty would entail an artificial division between the two pensions far removed from the realities of Mr Kohll's life.

48. In short, the income received by the applicant in the main proceedings from his two pensions constitutes rights acquired through his status of a worker having exercised freedom of movement as a worker, and those rights are protected under Article 45 TFEU, in the light of which the provision of national law at issue must therefore be examined.

B – *Whether there is a restriction of freedom of movement for workers*

49. Although some of the pleadings lodged in these proceedings appear to link the possible infringement of freedom of movement for workers to the obligatory requirement of possession of a tax deduction document under Article 139*ter* LIT, I believe that that obligation is no more than a material representation of the different deductions made in every tax year. In my opinion, the document in itself has merely probative force and does not create a right to claim the tax credit concerned. Accordingly, in order to determine whether Article 45 TFEU has been breached, the analysis should focus on the provisions of the contested legislation rather than the deduction document.

50. Having clarified that point, I shall begin the examination of whether there is an infringement of a fundamental right laid down in the Treaty in the usual manner, in other words, by recalling the settled case-law in accordance with which Member States must exercise their competence in any area consistently with Union law.[21] That proposition has not lost its force through being commonplace, for we shall see in the analysis of justification the importance of having regard to certain factors in addition to the traditional arguments relied upon to justify restrictions of this kind, such as the coherence of the tax system,[22] the necessity of ensuring fiscal supervision and the fight against fraud.[23]

20 — As in the judgment in *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 28), Mr Kohll has complained to the authorities of his Member State that the contested provision places him at a disadvantage because he worked in another Member State.

21 — See, for example, the judgments in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 36); *Commission* v *Belgium* (C-250/08, EU:2011:793, paragraph 33); and *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 20).

22 — That justification was recognised for the first time in the judgment in *Bachman* (C-204/90, EU:C:1992:35, paragraph 21), and has been used frequently in other, subsequent judgments, such as those in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 43), and *Commission* v *Belgium* (C-250/08, EU:2011:793, paragraph 70).

23 — See, for example, the judgment in *Petersen* (C-544/11, EU:C:2013:124, paragraph 50 and the case-law cited therein).

51. As far as freedom of movement for persons is concerned, the Court has held that the provisions of the Treaty in that area are intended to facilitate the pursuit by citizens of the Union of occupational activities of all kinds throughout the European Union, and preclude measures that might place citizens of the Union at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. [24]

52. More specifically, in relation to freedom of movement for workers, the Court has ruled that national provisions preventing or deterring a worker who is a national of a Member State from leaving his country of origin in order to exercise his right to free movement constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned. [25]

53. In the present case, Article 139*ter* LIT deprives of a tax benefit, the tax credit, a pensioner whose pension does not come from a Luxembourg pension fund or other Luxembourg institution liable for payment. That difference in treatment could deter both workers in Luxembourg who wish to seek employment in another Member State, and Luxembourg workers, or workers who are nationals of other Member States, who wish to settle in Luxembourg after their retirement.

54. The national legislation at issue also creates indirect discrimination, [26] in so far as the lack of a tax deduction document, and what that entails, will lead to refusal to pay the tax credit to nationals of other Member States in a higher proportion than to Luxembourg nationals, since it will be the former in particular who will receive pensions from other Member States. [27]

55. Admittedly, there would be no difference in treatment if Mr Kohll's situation were distinct from that of a pensioner who receives his pension from a Luxembourg pension fund. The examination of the difference between the situations at issue is also typical in cases involving direct taxation and the freedoms of movement and must, for overriding reasons of legal theory, be made before the justification offered is analysed. [28]

56. Assessment of whether situations are comparable has been carried out primarily in cases concerning non-residents vis-à-vis residents in a particular Member State. [29] In that connection, the Court has held that there is no objective difference between the situation of a non-resident who receives no significant income in the Member State of his residence and obtains the greater part of his taxable income from an activity performed in another Member State and that of a resident engaged in comparable employment in the latter State. [30]

57. It follows from the foregoing that if, in the circumstances described above, the resident and the non-resident are in objectively comparable situations, then *a fortiori* so must two taxpayers be who are resident in the same Member State, as in the present case. Since the DTC between Luxembourg and the Netherlands makes income from pensions like those of Mr Kohll taxable in Luxembourg, the only distinguishing aspect is the Netherlands origin of the pension of the applicant in the main proceedings.

24 — For example, the judgments in *Bosman* (C-415/93, EU:C:1995:463, paragraph 94); *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 37); and *Kranemann* (C-109/04, EU:C:2005:187, paragraph 25).

25 — Judgments in *Köbler* (C-224/01, EU:C:2003:513, paragraph 74), and *Kranemann* (C-109/04, EU:C:2005:187, paragraph 26).

26 — According to the case-law of the Court, *the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result* (*Sotgiu*, C-152/73, EU:C:1974:13, paragraph 11).

27 — See, by comparison, the judgment in *Biehl* (C-175/88, EU:C:1990:186, paragraph 14).

28 — See, for example, the judgments in *Grünewald* (C-559/13, EU:C:2015:109, paragraphs 24 to 38), and *Schröder* (C-450/09, EU:C:2011:198, paragraph 37).

29 — Beginning with the well-known judgment in *Schumacker* (C-279/93, EU:C:1995:31).

30 — Judgments in *Schumacker* (C-279/93, EU:C:1995:31, paragraphs 36 and 37), and *Turpeinen* (C-520/04, EU:C:2006:703, paragraphs 28 and 29).

58. However, it would be paradoxical, and even contradictory, for that transnational aspect, which is precisely what affords Mr Kohll the protection of Article 45 TFEU, to be the key argument too for maintaining that a pensioner receiving his pension from a Luxembourg pension fund and one receiving his pension from another Member State are not in objectively comparable situations.

59. In addition, given the objective of the LIT [31] (in other words, assisting disadvantaged persons by increasing their disposable income), the structure of that national legislation is perhaps not particularly coherent. Although this is not the situation of the applicant in the main proceedings, [32] pensioners who receive small pensions from another Member State will not be eligible for the tax benefit, although it is clear that they will be in the same situation, from a financial and material point of view, as pensioners whose pensions are paid by Luxembourg pension funds.

60. Consequently, I believe that persons like Mr Kohll and pensioners resident in Luxembourg who receive their pension from Luxembourg pension funds are in the same situation, from a tax perspective, in that country.

61. Lastly, although the Luxembourg Government has not explicitly said so, it could be assumed that the low value of the tax credit (a maximum annual sum of EUR 300) would not have a deterrent effect on workers in relation to the exercise of their right to freedom of movement. In that regard, it should be observed, in accordance with settled case-law, that a restriction of a fundamental freedom, even if of limited scope or minor importance, is prohibited by the Treaty. [33]

62. Accordingly, as a first interim conclusion, I believe that the legislation at issue constitutes a restriction of the freedom of movement for workers laid down in Article 45 TFEU.

C – *Whether the restriction of freedom of movement for workers is justified*

63. As is well known, analysis of the compatibility of national legislation contrary to the principle of freedom of movement for workers does not end when it is clear that there is a restriction of that freedom. In the context of that analysis, the Court applies a rule of reason [34] intended to temper the effects of bringing such national rules within the scope of Article 45 TFEU.

64. So, in the Court's words, a measure constituting an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Moreover, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose: [35] the well-known proportionality test.

65. I have set out, at points 24 and 25 of this Opinion, the two arguments put forward by the Luxembourg Government in support of the compatibility of its national measure with Article 45 TFEU: the disproportionate consequences of an amendment of that measure and the coherence of the tax system.

31 — I agree with the view of Advocate General Jääskinen that account should also be taken of the purpose of the national provisions concerned when analysing whether such situations are comparable (Opinion in *Commission* v *Estonia*, C-39/10, EU:C:2011:770, point 73).

32 — It may be inferred from the order for reference that, in the light of Mr Kohll's income from the two pensions at issue in the main proceedings, he cannot be classified as disadvantaged, without there being any need to provide more details on the amount at this juncture.

33 — Judgment in *F.E. Familienprivatstiftung Eisenstadt* (C-589/13, EU:C:2015:612, paragraph 50 and the case-law cited therein).

34 — It was Advocate General Léger who, in his Opinion in *Schumacker* (C-279/93, EU:C:1994:391, points 47 and 48), used that term to describe that step in the analysis of restrictions of the free movement of workers.

35 — Judgment in *Petersen* (C-544/11, EU:C:2013:124, paragraph 47 and the case-law cited therein).

66. As regards the first argument, the Luxembourg Government refers to the characteristic features of the tax credit, stating that the keeping of tax deduction documents by pension funds and other institutions liable for payment places them in a better position both to grant the tax credit and to impute it or refund it directly and effectively. The Luxembourg Government goes on to state that any amendment of that system would, therefore, lead to disproportionate administrative consequences for the authorities, pension funds and taxpayers. The tax document system does not allow for inclusion of pensioners whose pensions come from other Member States, since pension funds and other organisations in Luxembourg lack the means to make deductions at source from such pensions.

67. That argument is not persuasive, for three reasons. The first is that Mr Kohll is not asking for his Netherlands pensions to be automatically subject to deductions in Luxembourg. Mr Kohll's complaint does not stem from the fact that pensions from other Member States are not eligible for deduction at source but rather from the absolute refusal to grant the tax benefit, in the form of a tax credit, which is intended to increase his disposable income. The tax benefit could either be granted at another stage of the relationship between the taxpayer and the tax authorities, such as, for example, when the income tax return is submitted, by means of a deduction from the amount of tax. That option would enable pensioners in the same situation as Mr Kohll to receive the parallel increase in income, in accordance with the aim of the provision at issue as described by the Luxembourg Government.

68. The second reason which, to my mind, invalidates the argument put forward is that the Luxembourg Government has offered no conclusive explanation concerning the alleged administrative contingencies and their disproportionate nature. Vague reference to operational difficulties within the tax system is not sufficient for those difficulties to be deemed to have been established.

69. The third, and probably most convincing, reason arises from the Court's case-law to the effect that practical difficulties cannot of themselves justify infringement of a fundamental freedom guaranteed by the Treaty. [36] Given that the Luxembourg Government has not linked the alleged difficulties in question to any other difficulty of a different nature, which might have contributed to the success of its first argument (still in the context of the analysis of the explanation put forward), there is no justification for the restriction of freedom of movement for workers created by Article 139*ter* of the LIT.

70. As its second argument, the Luxembourg Government invokes the necessity of preserving the coherence of the tax system, citing repercussions for the link between the tax collection system, in other words, deduction at source, and the application of the pensioners' tax credit. The Luxembourg Government contends that the contested provision is apt to attain the aim pursued by the tax measure and that there are no less restrictive measures that would achieve the same outcome.

71. Preserving the coherence of the tax system, as an allegedly 'exonerating' argument, is based on the view that the loss of revenue for the national treasury, resulting from the grant of a tax benefit, is offset by taxing the same taxpayer on his income in a sphere closely linked to that of the tax benefit. [37]

72. In the instant case, however, I agree with the Commission that the alleged coherence of the tax system at issue has not been demonstrated. In particular, there is no direct connection between the tax benefit and the tax offsetting it. The connection to which the Luxembourg Government refers is concerned with the tax benefit in relation to the technique of the deduction but not in relation to another tax created in order to counter the loss of tax revenue caused by the grant of the tax credit. Consequently, that second argument relied on by the Luxembourg Government in support of the compatibility of Article 139*ter* of the LIT with Article 45 TFEU should also be dismissed.

36 — Judgment in *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 60).

37 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in *Terhoeve* (C-18/95, EU:C:1998:177, point 62), explaining the justification in the judgment in *Bachmann* (C-204/90, EU:C:1992:35).

73. The gamut of reasons that may be relied upon as justification in the context of the overall assessment of freedom of movement for workers is not exhausted by the two reasons analysed above. In fact, the Court has accepted the validity of other justification, which I shall deal with briefly, even though the Luxembourg Government has not invoked such reasons.

74. Thus, confining the examples to the sphere of taxation, justification based on the necessity of safeguarding the balanced allocation of powers of taxation between the Member States [38] may be accepted, in particular, when the tax system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory. [39]

75. However as the Commission rightly observes, that justification is not appropriate in the present case, for Luxembourg has the power, under Article 19 of the DTC, to tax both pensions received by pensioners from pension funds in that Member State and pensions originating in the Netherlands.

76. The Luxembourg Government submits that, in the sphere of which the national legislation at issue forms part, that is to say, social policy, the Court has also accepted that certain objectives of a socio-political nature may be relied upon that could constitute an overriding reason relating to the public interest; for example, incentives for the construction of rental property in order to satisfy the demand for such housing in Germany, [40] facilitating the purchase of a first home by individuals as part of the more general context of Greece's social policy, [41] and also development-policy objectives. [42]

77. According to the case-law cited in the previous point, a measure that provides for a tax benefit and constitutes a restriction of the free movement of workers may be justified if it pursues a social-policy objective, provided that it is suitable for securing the attainment of that objective and does not go beyond what is necessary to achieve it.

78. In the present case, the purpose of the legislative amendment of 2008, which inserted Article 139 *ter* into the LIT was, again according to the explanations given by the Luxembourg Government, to increase the disposable income of pensioners with a view to assisting the most disadvantaged persons. However laudable that objective may be, it must be acknowledged that the measure does not appear entirely suitable for achieving an objective of a social nature when, on the one hand, it excludes all pensioners who, like Mr Kohll, receive their pension from other Member States and are liable for tax in Luxembourg, and, on the other hand, it sets no ceiling on the level of income of recipients, since it also benefits pensioners with high incomes. The provision at issue is not, therefore, suitable for fully meeting the theoretical objective inspiring it, from which it follows that the social-policy objective cannot be relied upon either.

79. Finally, and in the alternative, should the Court find that the legislation at issue is justified by any of the grounds examined above, I believe that the objective pursued is not proportionate either. There are less onerous methods, in legal terms, of achieving that objective without excluding pensioners who, like Mr Kohll, receive their pension from another Member State. As I have already indicated, those methods include, for example, the option of providing for a deduction from the amount of tax equal to the maximum amount of the tax credit.

38 — The Commission refers to this justification in its written observations.

39 — Judgment in *Bouanich* (C-375/12, EU:C:2014:138, paragraph 81 and the case-law cited).

40 — Judgment in *Grundstücksgemeinschaft Busley and Cibrián Fernández* (C-35/08, EU:C:2009:625, paragraphs 31 and 32).

41 — Judgment in *Commission* v *Greece* (C-155/09, EU:C:2011:22, paragraphs 51, 52, 70 and 71).

42 — Judgment in *Petersen* (C-544/11, EU:C:2013:124, paragraph 59).

80. In short, I believe that the legislation with which the question referred for a preliminary ruling is concerned cannot be justified. I therefore have to confirm the interim conclusion advanced above, which is that Article 139*ter*(1) of the LIT is not compatible with the principle of freedom of movement for workers, laid down in Article 45 TFEU, inasmuch as it restricts eligibility for pensioners' tax credit solely to persons subject to the system of tax deduction at source.

V –Conclusion

81. In the light of the foregoing arguments, I propose that the Court of Justice should answer the question referred for a preliminary ruling by the Tribunal administrative du Luxembourg as follows:

Freedom of movement for workers, laid down in Article 45 TFEU, precludes a national measure, like Article 139*ter*(1) of the amended Law of 4 December 1967 on income tax, in so far as the latter restricts eligibility for pensioners' tax credit solely to persons subject to the system of tax deduction at source.