JUDGMENT OF THE COURT (Grand Chamber)

24 February 2015 (*)

(Reference for a preliminary ruling — Freedom of movement for workers — Article 45 TFEU — Equal treatment of non-resident workers — Tax advantage consisting in the exemption of reimbursements paid by the employer — Advantage granted on a flat-rate basis — Workers from a Member State other than that of the place of work — Requirement of residence at a certain distance from the border of the Member State of the place of work)

In Case C-512/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 9 August 2013, received at the Court on 25 September 2013, in the proceedings

C.G. Sopora

v

Staatssecretaris van Financiën,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen and T. von Danwitz, Presidents of Chambers, A. Rosas, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, M. Berger, A. Prechal and C.G. Fernlund (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 September 2014,

after considering the observations submitted on behalf of:

– Mr Sopora, by P. Kavelaars, J. Schaap and J. Korving, belastingadviseurs,

– the Netherlands Government, by M. de Ree and M. Bulterman, acting as Agents,

– the European Commission, by W. Roels and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 November 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the rules on free movement of workers within the European Union.

2 The request has been made in proceedings between Mr Sopora and the Staatssecretaris van Financiën (State Secretary for Finance) relating to the rejection of Mr Sopora's application for the flat-rate exemption for a reimbursement made in connection with his employment in the Netherlands.

Legal context

3 Under Article 31(1) of the 1964 Law on Wages Tax (Wet op de loonbelasting 1964), in its 2012 version ('the Law on Wages Tax'), certain reimbursements paid to workers are included in the taxable wage.

4 Under Article 31a(2)(e) of the Law on Wages Tax, however, reimbursements may be exempt from that tax if they are granted in order to offset additional expenses, known as 'extraterritorial expenses', which a worker incurs as a result of the fact that he is staying outside his country of origin for a period not exceeding eight years.

5 The Decision of 17 May 1965 implementing the 1964 Law on Wages Tax, as amended by the Decision of 23 December 2010, lays down the detailed rules for the application of that law from 1 January 2012. It makes provision for a tax exemption in respect of wages paid to an 'incoming worker', a term defined by Article 10e(2)(b) as follows:

'a worker recruited in another country ...:

1° who has particular skills which are not available or are scarce on the Netherlands labour market, and

2° who, for more than two thirds of the 24-month period preceding his recruitment in the Netherlands, was residing at a distance of more than 150 kilometres from the Netherlands border, excluding the territorial sea of the Netherlands and the exclusive economic zone of the Kingdom, as defined in Article 1 of the Law creating an exclusive economic zone.'

6 It appears from the documents before the Court that the reimbursements granted to cover extraterritorial expenses are, at the joint request of the 'incoming worker' and the employer, exempt from tax, in an amount up to 30% of the taxable base, without any proof of those expenses having to be produced ('the flat-rate rule'). The taxable base essentially comprises income connected with the employment and the reimbursement of extraterritorial expenses. In addition, it remains possible to produce proof of higher expenses incurred and to obtain an exemption for that reimbursement up to the amount of those expenses. Furthermore, in the case of a worker recruited in another Member State who does not satisfy the requirement of residence at a distance of more than 150 kilometres from the Netherlands border, it is also possible for him to obtain an exemption for the reimbursement of extraterritorial expenses incurred for which he can provide proof.

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Mr Sopora was employed in the Netherlands from 1 February 2012 to 31 December 2012 by a company associated with his employer established in Germany. During the 24-month period prior to his recruitment in the Netherlands, Mr Sopora had his place of residence in Germany, at a distance of less than 150 kilometres from the Netherlands border. Thereafter, he remained resident in Germany, whilst renting a flat in the Netherlands in which to stay during part of the week.

8 Mr Sopora and his employer requested the competent authority to apply the flat-rate rule.

9 By decision of 11 April 2012, confirmed after Mr Sopora had lodged an objection, that authority found that Mr Sopora did not satisfy the requirement that, for more than two-thirds of the 24-month period prior to his recruitment in the Netherlands, he must have resided at a distance of more than 150 kilometres from the Netherlands border.

10 Mr Sopora brought an action against that decision before the Rechtbank te Breda (District Court, Breda). That court dismissed his action after finding, in particular, that the requirement that the worker had to reside at such a distance from the Netherlands border was not contrary to EU law.

11 Mr Sopora brought an appeal in cassation against the decision of the Rechtbank te Breda before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

12 In the order for reference, the Hoge Raad asks whether the flat-rate rule is compatible with EU law.

13 It indicates, first of all, that the Netherlands legislature had stated that workers coming from other Member States generally experience a higher cost of living than do workers who have for a long time been established in the Netherlands. In order to avoid any dispute as to the level of those expenses, the legislature initially wished to make the flat-rate rule applicable to workers belonging to the first group in every case and without the need for further proof.

14 The referring court then sets out the reasons why the criterion based on a distance of more than 150 kilometres from the Netherlands border was introduced as from 1 January 2012.

15 It states that the flat-rate rule had been used more widely than had been envisaged at the time of its adoption, and that this gave rise to a distortion of competition in the cross-border region to the detriment of workers resident in the Netherlands. Employers established in that Member State made greater use of workers residing outside the country, to whom they could pay a lower salary as a result of the application of the flat-rate rule, while at the same time ensuring that those workers would have a higher net income for the same work. The national legislature wished to rectify that situation by excluding from the benefit of the flat-rate rule workers who could be assumed to incur limited, or even no, extraterritorial expenses inasmuch as they could travel each day from their place of residence to their place of work and back again. The national legislature for that reason introduced the criterion based on a distance of 150 kilometres as the crow flies between the worker’s place of residence in the Member State of origin and the Netherlands border. The national legislature took the view that, beyond such a distance, a worker could not travel to and from his place of work on a daily basis.

16 According to the referring court, the national legislature has acknowledged that, for workers residing in the Member State of origin at a distance of less than 150 kilometres from the Netherlands border, the distance separating them from their place of work may vary considerably. The legislature, however, formed the view that taking into account the distance between the place of work in the Netherlands and the place where the worker resided in the Member State of origin prior to his recruitment in the Netherlands would have led to implementation problems for the tax authorities.

17 Finally, the referring court asks whether the distance criterion adopted results in a distinction being made between comparable situations and, in the event that it creates an impediment to the free movement of workers, whether that impediment can be justified.

18 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Can an indirect distinction on the basis of nationality or an impediment to the free

movement of workers — requiring justification — be said to exist if the legislation of a Member State allows the tax-free reimbursement of extraterritorial expenses for incoming workers and a worker who, in the period prior to his employment in that Member State, lived outside that Member State at a distance of more than 150 kilometres from the border of that Member State may, without the provision of further proof, be granted tax-free reimbursement of expenses calculated on a flat-rate basis, even if that amount exceeds the extraterritorial expenses actually incurred, whereas, in the case of a worker who, during that period, lived within a shorter distance of that Member State, the extent of the tax-free reimbursement is limited to the demonstrable actual amount of the extraterritorial expenses?

(2) If Question 1 is to be answered in the affirmative: is the relevant Netherlands rule, as laid down in the Decision of 17 May 1965 implementing the 1964 Law on Wages Tax, based on overriding reasons in the public interest?

(3) If Question 2 is also to be answered in the affirmative: does the 150-kilometre criterion in that rule go further than is necessary to attain the objective pursued?'

Consideration of the questions referred

19 It must first be observed that the questions raised by the referring court concern the compatibility with EU law of a tax advantage which a Member State grants to workers who, prior to taking up employment in its territory, resided in another Member State at a certain distance from its border. That advantage consists in a flat-rate exemption from the tax on wages for the reimbursement of extraterritorial expenses in an amount up to 30% of the taxable base, without those workers having to demonstrate that they did in fact incur those expenses or that those expenses in fact came to the amount of that reimbursement.

20 Thus, by its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 45 TFEU must be read as precluding national legislation, such as that at issue in the main proceedings, by which a Member State provides that workers who resided in another Member State prior to taking up employment in its territory are to be granted a tax advantage consisting in the flat-rate exemption for reimbursement of extraterritorial expenses, on condition that those workers resided at a distance of more than 150 kilometres from its border.

21 Article 45(2) TFEU states that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

22 In particular, the Court has held that the principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax (judgments in *Biehl*, C-175/88, EU:C:1990:186, paragraph 12, and in *Schumacker*, C-279/93, EU:C:1995:31, paragraph 23).

23 Furthermore, the Court has consistently held that the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, such as the residence criterion, lead in fact to the same result (judgments in *Sotgiu*, 152/73, EU:C:1974:13, paragraph 11, and in *Schumacker*, EU:C:1995:31, paragraph 26).

24 Consequently, the freedom of movement of workers, first, prohibits a Member State from adopting a measure which favours workers residing in its territory if that measure ultimately favours that Member State's own nationals, thereby giving rise to discrimination based on nationality.

25 Secondly, having regard to the wording of Article 45(2) TFEU, which seeks to abolish all discrimination based on nationality ‘between workers of the Member States’, read in the light of Article 26 TFEU, the view must be taken that that freedom also prohibits discrimination between non-resident workers if such discrimination leads to nationals of certain Member States being unduly favoured in comparison with others.

26 Furthermore, the examination of the legislation at issue in the main proceedings must take account of the objective pursued by that legislation of facilitating the free movement of workers residing in other Member States who have accepted employment in the Netherlands and who are, by virtue of that fact, liable to incur additional expenses, by making the benefit of the flat-rate rule available to those workers and not to workers who have been resident for a long time in the Netherlands.

27 Taking the view, first, that, beyond a certain distance between the place of residence of the workers concerned, located in another Member State, and their place of work in the Netherlands, it is no longer possible for those workers to make the return journey on a daily basis, with the result that in principle they are compelled to find accommodation also in the Netherlands, and secondly, that the resulting additional living expenses are significant, the Netherlands legislature set that distance at 150 kilometres from the Netherlands border and set the ceiling for the amount of the fixed-rate exemption at 30% of the taxable base.

28 As has been noted in paragraph 6 of the present judgment, it is apparent from the order for reference that the flat-rate rule never operates to the disadvantage of those workers. If the extraterritorial expenses which were actually incurred exceed the flat-rate ceiling of 30%, it is possible, even where the conditions laid down for applying the flat-rate rule are met, for those workers to obtain an exemption for the reimbursement of extraterritorial expenses on production of appropriate proof.

29 The referring court also wishes to emphasise that workers who do not satisfy the condition of residence at a distance of more than 150 kilometres from the Netherlands border may, on production of appropriate proof, be entitled to an exemption for extraterritorial expenses actually incurred under the rule set out in Article 31a(2)(e) of the Law on Wages Tax. However, that scenario does not permit any overcompensation in respect of those expenses, unlike the situations in which the flat-rate tax exemption is applied, the latter being granted irrespective of the actual amount of the extraterritorial expenses and even where the amount of those expenses is nil.

30 It thus appears that all non-resident workers, whether they live more, or less, than 150 kilometres from the Netherlands border, may benefit from a tax exemption for reimbursement of actual extraterritorial expenses. The administrative simplification of the claim for those extraterritorial expenses resulting from the benefit of the flat-rate rule is, however, reserved for workers who live at a distance of more than 150 kilometres from that border.

31 It is also common ground that most Belgian workers and some German, French, Luxembourgish and United Kingdom workers are thus excluded from the benefit of the flat-rate rule.

32 It is, however, an inherent aspect of the granting, on a flat-rate basis, of a tax advantage which is deemed to cover situations in which the material conditions governing entitlement to that advantage have been satisfied beyond doubt that there will be other situations in which, for a variety of reasons, those conditions have also been satisfied, with those situations also giving rise to a right to that advantage on production of appropriate proof.

33 While it is true that considerations of an administrative nature cannot justify a derogation by a Member State from the rules of EU law (judgment in *Terhoeve*, C-18/95, EU:C:1999:22,

paragraph 45), it is also clear from the Court's case-law that Member States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities (see judgments in *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 67; in *Josemans*, C-137/09, EU:C:2010:774, paragraph 82; and in *Commission* v *Spain*, C-400/08, EU:C:2011:172, paragraph 124).

34 The mere fact that limits are set concerning the distance in relation to the workers' place of residence and concerning the ceiling of the exemption granted, taking as the starting point the Netherlands border and the taxable base, respectively, even though, as the referring court states, this is necessarily approximate in nature, cannot therefore, in itself, amount to indirect discrimination or an impediment to the free movement of workers. This is *a fortiori* so where, as in the present case, the flat-rate rule operates in favour of the workers who benefit from it, in that it reduces significantly the administrative steps which those workers must undertake in order to obtain the exemption for the reimbursement of extraterritorial expenses.

35 The position would, however, be different if — and this is a matter for the referring court to ascertain — those limits were set in such a way that the flat-rate rule were systematically to give rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

36 In the light of the foregoing considerations, the answer to the questions referred is that Article 45 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, by which a Member State provides that workers who resided in another Member State prior to taking up employment in its territory are to be granted a tax advantage consisting in the flat-rate exemption of reimbursement of extraterritorial expenses in an amount up to 30% of the taxable base, on condition that those workers resided at a distance of more than 150 kilometres from its border, unless — and this is a matter for the referring court to ascertain — those limits were set in such a way that that exemption systematically gives rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 45 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, by which a Member State provides that workers who resided in another Member State prior to taking up employment in its territory are to be granted a tax advantage consisting in the flat-rate exemption of reimbursement of extraterritorial expenses in an amount up to 30% of the taxable base, on condition that those workers resided at a distance of more than 150 kilometres from its border, unless — and this is a matter for the referring court to ascertain — those limits were set in such a way that that exemption systematically gives rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

[Signatures]

* Language of the case: Dutch.