Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 11 July 2018 [1]

Case C-272/17

K.M. Zyla
intervener:
Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Preliminary ruling — Free movement of workers — Equal treatment — Income tax — Social security contributions — Tax credit and contributions component of the tax credit — Worker who changes his or her place of residence during the calendar year — Apportionment of the credit on the basis of the period of insurance)

1. Freedom of movement for workers, protected under Article 45 of the FEU Treaty, precludes measures the effect of which is to deter nationals who wish to leave their State of origin to work in another Member State. It also protects persons who return to their State of origin after having worked in paid employment in the country to which they moved, at least as regards legal relationships arising as a result of that employment relationship. [2]

2. Such deterrent measures may include those of a fiscal nature and those relating to social security contributions. Although provisions governing personal income tax and provisions governing social security usually have their own assessment procedures, in the Netherlands a combined annual return (and calculation of the amounts due) is filed in respect of both taxable income and social security contributions. [3]

3. Ms Zyla, a Polish national, worked for nearly half of 2013 in the Netherlands, where she paid Netherlands social security contributions and income tax. According to the information in the case file, on her return to Poland, Ms Zyla did not earn enough income in the second half of that same year to pay Polish social security contributions or to owe income tax in that country.

4. When the Netherlands tax authorities calculated the statutory reduction which they were required to make in respect of the social security contributions already paid by Ms Zyla, they applied a time-proportionate reduction based on the period (six months) during which she had paid contributions in the Netherlands.

1 Original language: Spanish.

2 Judgment of 26 May 2016, *Kohll and Kohll-Schlesser* (C-300/15, EU:C:2016:361, paragraphs 24 to 26 and the case-law cited).

3 The ‘IB/PVV return’.

5. The dispute before the Netherlands courts concerns whether Article 45 TFEU, as interpreted by the Court of Justice in relation to direct taxation,[4] requires the Netherlands authorities to take into account Ms Zyla's personal and family circumstances in Poland in order to grant her the reduction at issue in its entirety rather than only the reduction proportionate to the time worked there.

6. The dispute between Ms Zyla (who is dissatisfied with the assessment notice issued to her) and the Netherlands tax authorities has reached the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which has made this reference for a preliminary ruling.

I. Legislative framework

A. EU law

1. Regulation (EU) No 492/2011[5]

7. Article 7 provides:

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

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

…'

2. Regulation (EC) No 883/2004[6]

8. Article 3 reads:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

(b) maternity and equivalent paternity benefits;

(c) invalidity benefits;

(d) old-age benefits;

…'

4 Judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31; 'the judgment in *Schumacker*').

5 Regulation of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

6 Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

9. According to Article 4:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

10. Article 5 provides:

'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

…'

11. Title II ('Determination of the legislation applicable'), Article 11(1), provides:

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.'

12. Article 11(3) states:

'3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…

(e) any other person to whom subparagraphs (a) to (d) do not apply [7] shall be subject to the legislation of the Member State of residence, …'

B. National legislation

13. In the Netherlands, the Wet op de inkomstenbelasting 2001 (the 'IB Law') governs income tax while the Wet financiering sociale Verzekeringen ('WFSV') governs the financing of social security.

14. It is apparent from Article 8(1) of the IB Law that, in order to calculate the 'combined tax', tax on income from employment (and from other sources such as residential property and savings) is added to social security contributions, items to which the relevant rates are applied. Once the combined tax has been established in that way, a tax credit — also combined — is applied in respect of those two items.

15. Under Article 8(10) of the IB Law, taxpayers may opt for a 'general tax credit'.

7 Points (b), (c) and (d) refer, respectively, to civil servants, unemployed persons and persons called up for military service in a Member State.

16. In accordance with Article 9 of the WFSV, social security contributions[8] are calculated by subtracting the 'general tax credit' from the amount of contributions paid in each tax period.

17. Article 12 of the WFSV explains how the social security contributions component of the tax credit is applied. Article 12(3) stipulates that persons who have paid contributions throughout the calendar year are entitled to that credit, while the rules for calculating the credit where persons obliged to pay social security obligations do so for only part of the year must be laid down in a ministerial order.

18. The Ministerial Order implementing the WFSV[9] complied with that requirement. According to Article 2(6a), in the case of persons who are not liable to pay social security contributions for part of the calendar year (for reasons other than death), the general tax credit is calculated pro rata, that is, in proportion to the period during which contributions were actually paid in the calendar year.

C. Facts giving rise to the proceedings and the question referred for a preliminary ruling

19. Ms Zyla, who is of Polish nationality, was gainfully employed in the Netherlands between 1 January and 21 June 2013. During that period, she was compulsorily insured under the general social security system and, therefore, was liable to pay social security contributions. After 21 June,[10] Ms Zyla returned to Poland where there is no record[11] of her having carried out any paid work in 2013.

20. Ms Zyla earned EUR 9 401 from her employment activity in the Netherlands in the 2013 tax year, from which the sum of EUR 1 399 was withheld in respect of tax on employment income. Her social security contributions came to EUR 2 928.

21. Ms Zyla elected to have the Netherlands provisions (of the IB Law) governing domestic taxable persons applied to her. To that end, she filed her IB/PVV return for the 2013 tax year.

22. For the purposes of the final IB/PVV assessment, the Netherlands tax authorities applied to Ms Zyla: (a) the tax credit relating to income tax, in the amount of EUR 1 254; and (b) the tax credit relating to social security contributions in the amount of EUR 840. The latter amount resulted from the application of the *pro rata temporis* criterion in proportion to the period during which Ms Zyla had actually paid social security contributions in the 2013 tax year.

23. Ms Zyla unsuccessfully challenged the assessment before the Rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant, the Netherlands) and, on appeal, before the Gerechtshof's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, the Netherlands). At both instances, the debate concerned whether Ms Zyla was entitled to the total amount of the tax credit, and the compatibility of Article 2(6a) of the Ministerial Order with Article 45 TFEU was called into question.

8 Contributions are governed by the Algemene Ouderdomswet (Law on general old-age insurance), the Algemene nabestaandenwet (Law on general survivors' insurance) and the Algemene Wet Bijzondere Ziektekosten (Law on special sickness insurance).

9 Regeling Wet financiering sociale verzekeringen ('Ministerial Order').

10 At the hearing, the Netherlands Government pointed out an error which had crept in throughout the different stages of the proceedings, for it appears that Ms Zyla returned to her country of origin on 21 July 2013. That detail may assist with a better understanding of the figures provided by the referring court which are reproduced in the next point.

11 The facts set out by the Netherlands court are not very clear in this respect. At the hearing, Ms Zyla's representative claimed that she did not carry out any paid work in Poland. In any event, if she had received any income this would not have enabled her to pay contributions and receive Polish social security benefits.

24. The appeal court found that there was no discrimination because it was not possible to rely on the judgment in *Schumacker* while it was, on the other hand, possible to rely on the judgment in *Blanckaert*.[12] The appeal court held that Article 2(6a) of the Ministerial Order was justified by the objective difference between the situation of a person insured under the Netherlands social security system and that of a person not so insured.

25. Before the Hoge Raad (Supreme Court), Ms Zyla continues to maintain that Article 2(6a) of the Ministerial Order results in an unacceptable difference in treatment between residents and non-residents, which creates an obstacle to the free movement of workers under Article 45 TFEU.

26. The referring court proceeds on the basis that residents who are not insured under the Netherlands social security system are not entitled to the full tax credit. Therefore, there is no direct link with residency. Furthermore, the request to treat Ms Zyla as a domestic taxpayer concerns income tax alone and not social security contributions.

27. The referring court considers that the resolution of the matter can be approached from two angles, with opposing outcomes. On the one hand, it is possible to rely on the judgment in *Blanckaert*, which found that a person insured under the Netherlands social security system and a person not so insured are in objectively different situations.[13] That difference in situations justified (in the light of the free movement of capital) national legislation which restricted reductions in social security to taxpayers insured under that system.[14]

28. However, the referring court believes that a second approach is also possible, whereby such reductions are categorised as a personal tax advantage. From that perspective, the time-proportionate application of the Netherlands legislation to a person who earned all of his or her income in the Netherlands would be tantamount to differentiating between residents and non-residents, contrary to the free movement of persons, because a taxable person liable to income tax who had resided in that Member State throughout the year would be entitled to the full reduction.[15] In that situation, the referring court states that the taking into account of the personal and family circumstances of the taxable person should cover the whole tax year,[16] although it cannot be ruled out that those circumstances may be taken into account in a time-proportionate manner.[17]

29. Against that background, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 45 TFEU be interpreted as precluding legislation of a Member State under which a worker who, pursuant to Regulation No 1408/71 or Regulation No 883/2004, is insured under the social security system of the Member State concerned for part of a calendar year, and who, when the contributions for that insurance are levied, is entitled to only a portion of the contributions component of the general tax credit which is determined on a time-proportionate basis in relation to the period of insurance, if that worker, for the remainder of the calendar year, was not insured under the social security system of that Member State, and was resident in another Member State for the remainder of the calendar year and earned (virtually) his entire annual income in the first-mentioned Member State?'

12 Judgment of 8 September 2005 (C-512/03, EU:C:2005:516; 'the judgment in *Blanckaert*').

13 Ibid., paragraph 50.

14 Ibid., paragraph 37.

15 By reference to the judgment in *Schumacker*.

16 According to the judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406).

17 Reference is made to the judgment of 9 February 2017, *X* (C-283/15, EU:C:2017:102).

II. Procedure before the Court of Justice

30. The order for reference was received at the Registry of the Court of Justice on 18 May 2017, and written observations were lodged by Ms Zyla, the Netherlands Government and the Commission, who participated in the hearing held on 30 May 2018.

III. Summary of the parties' arguments

31. Ms Zyla submits that the judgment in *Blanckaert* is not applicable to her. Although she acknowledges the validity of the premisses therein, she contends that that there is a limit to that case-law when a situation arises in which no Member State has taken into account the taxpaying capacity and personal and family circumstances of the taxpayer. [18]

32. Ms Zyla observes that, in such cases, discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the State of residence nor in the State of employment. [19] That would be her position if the disputed tax credit is not granted to her in full, since neither Poland nor the Netherlands assessed her personal and family circumstances.

33. The Netherlands Government submits that the circumstances of a taxpaying worker who resides in the Netherlands differ from that of a non-resident who no longer receives income from employment or self-employment in that Member State. It bases its position on the following arguments:

– First, Article 11(3)(a) of Regulation No 883/2004 creates a link between the applicable social security legislation and the Member State of employment. Since, after leaving and ceasing work in the Netherlands, Ms Zyla returned to her country of origin, she was not subject to the Netherlands social security system from the date of her departure, her contributions having ceased from that time.

– Second, justification for the difference in treatment when granting a tax advantage like that at issue reflects the different objective circumstances of (i) a person who is insured under the social security system of a Member State and (ii) a person who is not so insured.

34. The Netherlands Government denies that the judgment in *Schumacker* is relevant to this case because:

— In that judgment taxpaying capacity was identified as a relevant factor, whereas the payment of social security contributions is not based on such capacity.

— Making a worker subject to the legislation of the Member State of employment precludes another Member State from being able to require contributions from that worker in respect of the same activity. [20] In view of the fact that, after Ms Zyla left its territory, the Netherlands lost its power of taxation, the authorities of that Member State cannot be requested to apply reductions or other advantages for which Ms Zyla may have been eligible if she had continued to be insured under the Netherlands social security system.

18 Ms Zyla refers to the judgment of 16 October 2008, *Renneberg* (C-527/06, EU:C:2008:566, paragraphs 49, 50 and 59 to 62).

19 Judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 26 and the case-law cited).

20 Judgment of 26 February 2015, *de Ruyter* (C-623/13, EU:C:2015:123, paragraphs 40 and 41).

35. The Commission begins by ruling out any infringement by the national legislation of Article 7(2) of Regulation No 492/2011, since Ms Zyla could be regarded as a worker, for the purposes of Article 45 TFEU, only while she was employed in the Netherlands, a quality she lost when she returned to Poland.

36. However, in the Commission's submission, Article 2(6a) of the Ministerial Order applies primarily to persons who do not hold Netherlands nationality. It is those persons who most frequently leave the Netherlands at the end of an employment relationship, whereas Netherlands nationals remain in their country even if they have ceased working, meaning that the latter may offset the whole of the tax credit against social security contributions. However, persons, like Ms Zyla, who pay contributions for only part of the year, will end up paying proportionately more to the social security system, which constitutes an obstacle to the free movement of workers.

37. The Commission favours the application by analogy of the case-law pursuant to which the requirement of continued residence in the Member State of payment of social security contributions constitutes an obstacle to the free movement of workers if it deters a worker from leaving that country by requiring him to pay greater social security contributions,[21] or if it deprives that worker of the right which a resident taxpayer enjoys to repayment of overpaid tax.[22] Lastly, the Commission states that, since the majority of Ms Zyla's income came from a Member State other than her State of residence, without account being taken of her personal and family circumstances, the *Schumacker* case-law is applicable.

IV. Legal analysis

A. Preliminary remarks

38. First, I note that it is common ground between the parties that Article 45 TFEU is applicable. Since this is a case of a Polish citizen who moved to the Netherlands to work as an employee, it does not appear to be a situation covered by any of the other freedoms of movement apart from the free movement of workers.[23]

39. Nor can there be any question that Ms Zyla was a worker for the purposes of the case-law of the Court of Justice.[24] In theory, the question could arise as to whether return to her Member State of origin, without carrying out any employment or activity there, brings her situation within the scope of the free movement of persons under Article 21 TFEU.[25] However, since Ms Zyla pleads the right to have the tax credit applied to her in its entirety, as a result of the time she worked in the Netherlands, her claim is directly linked to Article 45 TFEU.

40. Second, the existence of EU rules enacted to implement that freedom makes it necessary to examine whether the national legislation at issue is compatible either with those rules (in this case, Regulations No 883/2004 and No 492/2011) or directly with primary law, that is, Article 45 TFEU.

21 Judgment of 26 January 1999, *Terhoeve* (C-18/95, EU:C:1999:22, paragraphs 39 and 40).

22 Judgment of 8 May 1990 *Biehl* (C-175/88, EU:C:1990:186, paragraph 16).

23 See judgment of 28 February 2013, *Petersen and Petersen* (C-544/11, EU:C:2013:124, paragraph 35 and the case-law cited therein).

24 'Worker' means any person 'who pursues activities which are effective and genuine … The essential feature of an employment relationship is … that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration' (judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284, paragraph 13).

25 See my Opinion in *Kohll and Kohll-Schlesser* (C-300/15, EU:C:2016:86, point 42).

41. As the Commission observes, Regulation No 883/2004 includes little more than a raft of conflict rules to prevent a worker who exercises his right to free movement within the European Union from being caught by the provisions of the social security legislation of a number of Member States or from not being covered any Member State's legislation. [26] It is therefore necessary to assess the validity of the national provision at issue in the light of Article 4 of Regulation No 883/2004, which calls for equality of treatment, and in particular the prohibition of discrimination on grounds of nationality.

42. Similarly, Article 7(2) of Regulation No 492/2011 lays down the right of EU workers who move freely within the European Union to receive the same social and tax advantages. Therefore, it simply transcribes the principle of equal treatment without giving it greater substance, although the Court of Justice has held that that principle includes indirect discrimination. [27]

43. In short, since the application of both regulations does not lead to any significant conclusions, in so far as is relevant for the present purposes, direct reference may be made to the freedom laid down in Article 45 TFEU, bearing in mind, nonetheless, that the analysis of any discrimination in the light of that provision may necessitate a reference to those regulations.

44. Third and lastly, the national proceedings (and the reference for a preliminary ruling itself) have mainly been concerned with the effect on those proceedings of the judgments in *Blanckaert* and *Schumacker*:

— According to the former judgment, the relationship between a person resident in a Member State and that State's social security system is a sufficient differentiating factor for that person's situation not to be treated in the same way as that of a person who has left that Member State to take up residence in another. That approach bears out the Netherlands Government's position in the proceedings.

— In accordance with the latter judgment, the Member State of taxation may be required to take into account the personal and family circumstances (in particular, for the purposes of tax advantages) of persons who do not reside in that country but earn most of their income there, where a taxpayer's income in his Member State of residence does not entitle him to access similar advantages. Ms Zyla relies on that case-law in support of her position.

45. When the dispute is set out in those terms, its outcome must take into account both those judgments, whose relevance to the assessment of the compatibility of the national legislation with Article 45 TFEU must, in the absence of a legal criterion in secondary law, [28] be examined in accordance with the methodology for analysis of the freedoms of movement.

B. Examination of the question

1. The alleged discrimination on grounds of nationality

46. Does the measure at issue involve discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment? [29]

26 See, by analogy, judgment of 26 February 2015, *de Ruyter* (C-623/13, EU:C:2015:123, paragraph 37).

27 Judgment of 20 June 2002, *Commission* v *Luxembourg* (C-299/01, EU:C:2002:394).

28 That is the usual approach. See, for example, judgment of 15 September 2005, *Ioannidis* (C-258/04, EU:C:2005:559, paragraphs 35 to 37).

29 Judgment of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraph 32).

47. In principle, I cannot find in the letter or the spirit of Article 2(6a) of the Ministerial Order elements which point to an intention to discriminate directly (thereby creating a disadvantage) against nationals of other EU Member States. The time-proportionate reduction applies to all workers who, regardless of their nationality, have been required to pay Netherlands social security contributions for a period of less than a calendar year.

48. Could the measure, nevertheless, be categorised as indirect discrimination? Measures are regarded as indirectly discriminatory if they are intrinsically liable to affect migrant workers more than national workers (in this instance, Netherlands workers) and if they entail a consequent risk that they will place the former at a particular disadvantage. [30]

49. In this case, for the alleged discrimination to exist, there would have to be:

— A prior assumption that migrant workers more frequently leave the Member State concerned before the end of the tax year, something which I do not believe can simply be assumed and which, in any event, has not been proved.

— Acceptance that, by being subject to that proportional reduction, nationals of other Member States are placed at a specific disadvantage under the Ministerial Order, [31] which calls for an examination of whether a restriction exists.

2. Is there an obstacle to the free movement of workers?

50. The provisions of the TFEU on the free movement of people are intended to facilitate the pursuit by nationals of EU Member States of occupational activities throughout the European Union. Those provisions therefore preclude measures which might place such nationals at a disadvantage when they wish to pursue an activity in a Member State other than their Member State of origin. That is why Article 45 TFEU precludes any national measure which is capable of hindering or rendering less attractive the exercise by Union nationals of that fundamental freedom. [32]

51. Article 2(6a) of the Ministerial Order would have that effect if the rule it includes were to place workers who move under Article 45 TFEU at a disadvantage.

(a) The disadvantage

52. If I have understood it correctly, the disputed measure is structured as follows: [33] the reduction to which everyone is entitled each tax year is divided into two parts: the first relates to taxable income while the second relates to social security contributions. It is the second part, to which only persons insured under the Netherlands social security system are entitled, which may be adjusted as a result of the *pro rata temporis* clause in Article 2(6a) of the Ministerial Order.

30 Judgment of 18 December 2014, *Larcher* (C-523/13, EU:C:2014:2458, paragraph 32 and the case-law cited).

31 See, in that connection, the Opinion of Advocate General Bobek in *Pöpperl* (C-187/15, EU:C:2016:194, point 35).

32 Judgment of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited). However, it must be borne in mind that EU law cannot guarantee to a worker that moving from one Member State to another will be neutral in terms of social security because of the disparities between the Member States' social security schemes and legislation (paragraph 34 of that judgment).

33 I am using here the explanations of the Netherlands Government at points 4 and 17 to 19 of its written observations. At the hearing, the Netherlands Government confirmed that the legislation at issue in this case is identical to that referred to in the judgment in *Blanckaert*, except as regards the time-proportionate calculation of the reduction.

53. The latter observation might create the impression that the social security component of the tax credit is by its nature a social advantage, given that it affects specifically and directly the financing of social security.[34] However, from a different perspective, the measure concerned relates to the declaration and assessment of personal income tax and is based on the exercise of the taxation powers of the Netherlands State. It could be considered, therefore, that its effects on the free movement of workers must also be examined in the light of the case-law on tax measures.[35]

54. Given its close link to social security contributions, I am inclined to the view that the reduction at issue is more social in nature, even though a taxation method is used to implement it. Although the Netherlands tax authorities collect income tax and social security contributions together, in such a way that credits applicable to the latter 'may … be converted into tax credits',[36] they each retain their own characteristics.

55. In any event, I do not consider that the time-proportionate reduction scheme really entails a disadvantage. If, as appears, the application of the scheme is perfectly proportionate to the contribution period, with the result that there is no asymmetry in the deductible amounts (that is, persons affected by the provision at issue do not pay proportionately more), it is not possible to identify any disadvantage.[37]

56. The disputed reduction is intended to offset, indirectly, the economic effort which social security contributions represent for taxpayers. That is why the reduction of those contributions is applied, positively for the beneficiary, to the annual burden. From that perspective, there is nothing to preclude the resulting alleviation of that burden from being proportionate to the period during which contributions have been paid. At the hearing, the Netherlands Government stated that the aim of the legislation was to encourage workers to continue to engage in occupational activities, by granting them a benefit always based on time actually worked. Be that as it may, the parallel between the contributions and the reduction applicable to them is retained when it comes to settlement of the final amount of tax due in the IB/PVV return: if the contributions are greater (because they cover 12 months), the amount deducted will be greater, and vice versa.

(b) Whether the situations are comparable

57. If, on the other hand, it is accepted, for the sake of argument, that the time-proportionate reduction of social security contributions constitutes a disadvantage for non-residents, due to its lesser impact on their tax returns (*quod non*), it will be necessary to take into account the case-law of the Court of Justice in accordance with which:

— Discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations.[38]

— Discrimination between residents and non-residents exists only if, notwithstanding their residence in different Member States, the two categories of taxpayers are in a comparable situation having regard to the purpose and content of the national provisions in question.[39]

34 Judgment of 26 February 2015, *de Ruyter* (C-623/13, EU:C:2015:123, paragraph 27 and the case-law cited).

35 See, in that connection, judgment of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraphs 41 to 44).

36 Judgment in *Blanckaert*, paragraphs 15 and 16.

37 See judgment of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 24 and the case-law cited).

38 See judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 21 and the case-law cited).

39 Judgment of 9 February 2017, *X* (C-283/15, EU:C:2017:102, paragraph 32 and the case-law cited).

58. It is also apparent from the case-law that the examination of the comparability of the situations must be carried out regardless of whether the measure at issue constitutes a mere social advantage [40] or comes within the sphere of taxation. [41]

59. In accordance with those criteria, is it really possible to state that a person who no longer works in the Netherlands, because she moved to another Member State and has therefore stopped paying social security contributions, is in the same situation as someone who has continued to reside in the Netherlands and still works there or has ceased working?

60. Social security contributions are governed by the principle of the application of the legislation of a single Member State, laid down, inter alia, in Article 11(1) of Regulation No 883/2004. [42] In accordance with that principle, persons who come within the scope of social security provisions are governed by the legislation of just one Member State. As the Commission pointed out in a different context, the purpose of that article is not to harmonise Member States' substantive law but, rather, to provide a system of conflict rules the effect of which is to divest the national legislature of the power to determine the ambit and the conditions for the application of its own national legislation on the matter. [43] The Court previously expressed the same view, in similar terms, in a judgment of 26 February 2015 [44] in relation to Regulation No 1408/71, [45] the predecessor of Regulation No 883/2004.

61. It can be seen from the foregoing that a Member State cannot change the rules governing the application of social security legislation so that persons who are resident in another Member State and do not carry out any paid work on its territory are subject to its social security system. If a Member State did this it would be in breach of Article 11(3)(e) of Regulation No 883/2004 and, consequently, of the principle of the application of the legislation of a single Member State.

62. That rule does not impose a criterion linked to *residence* in the Member State of employment but rather a criterion linked to *a person's being subject to the social security system* as a result of performing paid work in the territory of that State. In the absence of the latter link, that Member State does not have the power to levy social security contributions on that person. That is why, where there is no such link or — as occurs in this case — it is only temporary, a worker who is resident in the Netherlands for a whole year is in a different situation from a worker who is resident in another country (Poland, for example) and who has not paid contributions in the Netherlands or has done so for a certain period, in the same tax year. [46]

63. At the hearing, the Netherlands Government confirmed that a worker who, after carrying out paid work in the Netherlands for part of a calendar year, continues to reside in that country as an unemployed person for the remainder of that year is subject to the social security system and is required to pay Netherlands social security contributions for the whole year. That is precisely the difference vis-à-vis Ms Zyla's situation, which precludes a finding that the situations are comparable: unemployed persons, like Ms Zyla, who are resident in the Netherlands continue to pay contributions and are therefore eligible for the reduction applicable to (annual) contributions actually paid.

40 See, by analogy, judgment of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraph 37).

41 Judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 24).

42 See point 11 of this Opinion.

43 See judgment of 4 June 2016, *Commission* v *United Kingdom* (C-308/14, EU:C:2016:436, paragraph 32).

44 Judgment of 26 February 2015, *de Ruyter* (C-623/13, EU:C:2015:123, paragraph 35).

45 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), and as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1).

46 It is appropriate, at this juncture, to refer to the judgment in *Blanckaert*, paragraph 45.

64. Further, under the Netherlands legislation, as the Court of Justice itself has stated, 'insured persons under that [social security] system are entitled only in exceptional circumstances to tax credits in respect of social security. It is only in a situation where an insured person cannot set off reductions in contributions against contributions due that he can seek to obtain such tax credits.' [47]

65. If that is the case, a person who has paid Netherlands social security contributions throughout the year will be entitled to the alleged tax advantage [48] only if the total amount of their actual contributions is lower than the tax credit. Conversely, if, without taking into account the time the person concerned was *actually* insured, the reduction in respect of social security contributions were granted in full to persons who were insured under the Netherlands social security system for a few months of a tax year, they would be able to offset that surplus amount more easily: since such a person has paid less in absolute terms, it is more likely that the remainder referred to will provide them with an additional surplus. In that case, there would be the same treatment of different situations, since, I repeat, persons insured under that system 'are entitled only in exceptional circumstances to tax credits in respect of social security'.

66. Accordingly, even if the *pro rata temporis* criterion in Article 2(6a) of the Ministerial Order could be deemed to place persons in Ms Zyla's situation at a disadvantage, the application of that criterion takes place in circumstances which are not comparable with those of persons who are subject to the obligation to pay social security contributions throughout a whole tax year. The absence of a link to the social security system for part of the year is, therefore, sufficient for a finding that the situation of a person who pays contributions for such a reduced period is not comparable with the situation of a person who retains that link throughout the tax year.

67. In summary, I cannot find any breach of Article 45 TFEU, Article 4 of Regulation No 883/2004 or Article 7(2) of Regulation No 492/2011. None of those provisions precludes legislation like that contained in Article 2(6a) of the Ministerial Order.

(c) Relevance of the Schumacker case-law

68. The analysis I have set out would be incomplete without comparing it with the *Schumacker* case-law, on which Ms Zyla relies in support of her position.

69. As I have pointed out, in accordance with that judgment, '[i]n the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.' [49]

70. At first sight, that would appear to be Ms Zyla's situation. However, there continues to be a lack of objective comparability between the situations, [50] and that lack of comparability is accepted by the judgment in *Schumacker* as grounds for a difference in treatment. [51]

71. At all events, I disagree with the application by analogy of the judgment in *Schumacker* put forward by the Commission. In that case, at the material time, the taxable person resided solely in Belgium and earned income from his work solely in Germany, without any change of usual residence. By contrast, Ms Zyla was resident in the Netherlands for part of the 2013 calendar year, during which

47 Judgment in *Blanckaert*, paragraph 47.

48 The amount of tax decreases by subtracting the reduction in respect of social security contributions from the amount of contributions due during the year.

49 Judgment in *Schumacker*, paragraph 38.

50 I refer to point 57 et seq. of this Opinion.

51 Judgment in *Schumacker*, paragraph 37.

she earned income from employment whilst she was resident in that Member State. Then, the place of income and the place of residence were the same until she moved to Poland, where she did not work for the rest of that year. The facts on which the dispute is based therefore preclude the application by analogy to this case of the principles laid down in the *Schumacker* judgment.

3. In the alternative: is there a possible justification?

72. In applying the *pro rata temporis* rule to the social security contributions component of the tax credit in respect of persons who, like Ms Zyla, have only paid such contributions for part of a tax year, Article 2(6a) of the Ministerial Order is consistent with the rules laid down therein for the funding of the social security system, which is interwoven into the assessment of income tax.

73. That credit is applied in proportion to the time worked in the tax year: the proportion is 100% for a person who paid contributions throughout the year and decreases on a time-proportionate basis for a person who paid contributions for only a few months. The Netherlands authorities seek in that way to mitigate in a proportionate manner the economic effort which the deduction at source — or monthly payment — of social security contributions entails for taxpayers, through alleviation of the annual liability.

74. Given that –– in accordance with the principle of EU social security legislation referred to above,[52] whereby the legislation of a single Member State is to apply –– the Netherlands lacks competence to deduct at source the social security contributions paid by employees, like Ms Zyla, in another Member State, the configuration of the tax credit laid down in the legislation at issue reflects a logical symmetry.[53] In the absence of the time-proportionate reduction, persons in the same situation as Ms Zyla would obtain an undue advantage since their credit in respect of social security contributions would compensate them disproportionately as compared with persons paying social security contributions for the whole tax year, contrary to the objective of proportionately lightening the economic effort entailed by the payment of contributions. Therefore, there is a link between the tax credit and the initial levy (the payment of social security contributions).

75. Moreover, in accordance with the requirements of the case-law,[54] what is entailed is a reduction of the credit which is granted to the same taxpayer and in the context of the same tax. There is thus a direct, personal and material link between the elements of the tax mechanism in the main proceedings,[55] in which the reduction of the tax credit represents the pivot which ensures a balance between the tax and the credit on the basis of objective factors. Therefore, since the prerequisites laid down in case-law are satisfied, it must be held that the reduction system laid down in Article 2(6a) of the Ministerial Order is justified by the need to ensure the coherence of the Netherlands statutory rules.

76. Provided that that measure operates symmetrically (and there is nothing in the case file which casts doubt on this), that is to say, fully in proportion to the time worked in the Netherlands, it will not lead to treatment disadvantageous to an insured person to whom it is applied; that person will continue to receive his or her tax credit in respect of social security contributions but in accordance with the length of time during which he or she paid contributions before leaving the Netherlands.

52 See, in particular, point 60 of this Opinion.

53 See, by analogy, judgment of 1 December 2011, *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 73 and the case-law cited).

54 Ibid., paragraph 76 and the case-law cited.

55 Judgment of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 40 and the case-law cited).

77. The measure at issue is therefore *appropriate* to the aim which underlies it, notwithstanding its temporal limitation, and *necessary* in order to balance contributions strictly against the period during which contributions were not paid in the Member State. As I have already observed, it does not levy more tax on a taxable person on whom it is imposed proportionately than on a taxable person who has paid contributions throughout the year: the former will not pay more than the latter in respect of the period during which he was linked to the social security system.

78. In short, even if the requirement in Article 2(6a) of the Ministerial Order were to constitute a restriction of the free movement of workers laid down in Article 45 TFEU, that requirement would be justified by the need to ensure the coherence of the tax system and is proportionate to the aim pursued.

V. Conclusion

79. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands):

When a worker was insured for part of the calendar year under the social security system of a Member State, in which that worker earned nearly all his or her income for that tax year, and that worker later moved to another Member State where he or she resided for the remainder of the same year, Article 45 TFEU does not preclude legislation such as that at issue in the main proceedings, under which the first Member State, in the context of the assessment of income tax, limits proportionately the general tax credit applicable to social security contributions, on the basis of the period during which the worker has paid those contributions.