Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 November 2014[1]

Case C-512/13

C.G. Sopora(Request for a preliminary ruling from the

Hoge Raad der Nederlanden (Netherlands))

(Tax law — Freedom of movement for workers — Article 45 TFEU — National wages tax — Employer's reimbursement of the worker's extraterritorial expenses — Tax-free flat-rate expenses allowance for foreign workers in the amount of 30% of the taxable base for wages tax — Requirement of a foreign place of residence at a distance of more than 150 kilometres from the national border — Preferential treatment vis-à-vis nationals — Less favourable treatment of nationals of different Member States)

I – **Introduction**

1. When a Member State takes measures to promote the employment of foreign workers within the country, it does not at first seem obvious to view this as a problem for free movement in the internal market. However, in the present case, the Kingdom of the Netherlands has restricted that support to certain foreign workers by regarding the distance from their place of residence to the Netherlands border as an indication of their need for support. Only when that distance is sufficiently large can those workers actually benefit from the blanket assumption that they incur substantial expenses for maintaining two households, expenses which, in certain circumstances, are taken into consideration in the calculation of their wages tax.

2. Whether such differentiating support of foreign workers should be assessed by the criterion of the fundamental freedoms in the first place and, if so, to what extent a national legislature is entitled to rely in that regard on blanket assumptions for the sake of administrative simplicity will need to be clarified in what follows.

II – **Legal framework**

A – *EU law*

3. Article 45 TFEU reads as follows:

'1. Freedom of movement for workers shall be secured within the Union.

1 — Original language: German.

2. Such freedom of movement shall entail 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.

…'

4. Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union[2] ('the Regulation on free movement of workers') 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 [and] dismissal ...

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

…'

B – *National law*

5. The Kingdom of the Netherlands levies a wages tax. Under Article 31(1) of the Wet op de loonbelasting 1964[3] ('the Law on Wages Tax'), certain employer's reimbursements of expenses to the worker also form part of the taxed wages. However, pursuant to Article 31a(2)(e) of the Law on Wages Tax, reimbursements of expenses are exempt from the tax if they are granted in respect of expenses which a worker incurs by virtue of the fact that he is temporarily staying outside his State of origin, such as, for example, the costs of a second home or increased living costs, but also the costs of travel to an interview (known as extraterritorial expenses).

6. If a Netherlands employer engages a worker who, at that time, lives outside the Netherlands, a flat-rate scheme, contained in Articles 10e to 10j of the Uitvoeringsbesluit loonbelasting 1965 ('the Implementing Decision concerning Wages Tax'), is applicable in specific circumstances. Under that scheme, the employer's reimbursements of expenses are deemed, up to 30% of the taxable base for wages tax, to be reimbursement of extraterritorial expenses, without any need for detailed proof of the expenses to be produced ('the flat-rate scheme'). The production of proof for higher actual expenses remains possible.

7. The flat-rate scheme applies only to foreign workers who have a particular expertise which is not available or is scarce on the Netherlands labour market. Moreover, from 2012 onwards, an additional condition was introduced, under which, in the previous two years, the worker must have resided for longer than two thirds of that period at a distance of *more* than 150 kilometres, as the crow flies, from the Netherlands border ('the 150-kilometre condition').

III – **Dispute in the main proceedings**

8. The subject-matter of the dispute in the main proceedings is the application of the flat-rate scheme in the context of the wages tax of a worker, Mr Sopora.

2 — OJ 2011 L 141, p. 1.

3 — 2012 version, which is relevant for the purposes of the present proceedings.

9. In 2012, Mr Sopora worked for a Dutch employer in the Netherlands. For the two years immediately prior to taking up his employment in the Netherlands, he had his place of residence in Germany, though at a distance of *less* than 150 kilometres from the Netherlands border.

10. The Netherlands tax administration for that reason refused application of the flat-rate scheme in his case. Mr Sopora lodged an objection to this on the ground, inter alia, that the refusal to apply the flat-rate scheme was contrary to EU law.

IV – **Procedure before the Court of Justice**

11. On 25 September 2013, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the case has been brought, referred the following questions to the Court of Justice under Article 267 TFEU:

'(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 1965 Implementing Decision concerning 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?'

12. In the proceedings before the Court of Justice, Mr Sopora, the Kingdom of the Netherlands and the European Commission submitted written observations and took part in the hearing on 2 September 2014.

V – **Legal assessment**

13. By its three questions referred for a preliminary ruling, the referring court wishes in essence to ascertain whether a national rule which makes a tax advantage such as the flat-rate scheme here at issue dependent on a rule such as the 150-kilometre condition described above is compatible with freedom of movement for workers under Article 45 TFEU.

A – *Impairment*

14. The first question which thus arises is whether a rule such as the 150-kilometre condition impairs freedom of movement for workers.

15. Under Article 45(2) TFEU, freedom of movement for workers entails the abolition of all discrimination based on nationality between workers of the Member States, in particular as regards remuneration. According to the case-law, that also applies to provisions on income tax. [4]

16. That prohibition of unequal treatment applies not only to overt discrimination based on nationality, but also to all covert forms of discrimination which in fact lead to the same result through the application of other distinguishing criteria such as, in particular, the distinguishing criterion of residence. [5]

17. In the present case, the flat-rate scheme grants advantages because it allows a worker to receive reimbursements of expenses from his employer tax-free up to 30% of the taxable base for wages tax without any need for the worker to provide proof of extraterritorial expenses and without any need for him to have actually incurred such expenses to that extent.

18. It is true that recourse to the flat rate scheme is not dependent on the nationality of the worker. However, the worker's place of residence before taking up the employment in the Netherlands is decisive. If he lived at a distance of less than 150 kilometres from the Netherlands border, he remains excluded from the flat-rate scheme.

19. That scheme distinguishes indirectly between nationals of different Member States. It places certain non-residents at a disadvantage vis-à-vis other non-residents. Only workers who have a place of residence in Belgium, Germany, France, Luxembourg or England can fail to meet the 150-kilometre condition on geographical grounds, whereas workers with a place of residence in other Member States will always satisfy it. As a result, even all workers who are resident in Belgium are likely to be excluded from the flat-rate scheme.

20. The distinctive feature of the present case consists only in the fact that the Member State concerned does not — unlike the situation usually examined by the Court — disadvantage non-residents vis-à-vis residents. In the present case, residents who are likewise employed by a Netherlands employer are not, from the outset, entitled to claim any extraterritorial expenses in the context of the wages tax scheme examined here. In addition, under the flat-rate scheme, Netherlands residents who work outside that Member State cannot have recourse to that scheme. Less favourable treatment therefore exists only for residents of certain Member States vis-à-vis residents of other Member States.

21. The question whether freedom of movement for workers also prohibits in principle different treatment of nationals of various Member States must therefore be clarified.

22. In this regard, the Commission has rightly pointed out that Article 7(1) and (2) of the Regulation on free movement of workers, which is based on Article 46 TFEU, merely requires workers from other Member States to be treated in the same way as national workers. This accords with Article 46(c) TFEU, which is concerned only with the conditions of work and employment which apply to national workers, on the one hand, and workers 'of other Member States', on the other.

23. However, the wording of Article 45(2) TFEU, which defines the content of freedom of movement for workers, is more broadly formulated. Under that provision, as regards conditions of work and employment, 'any discrimination based on nationality between workers of the Member States' is prohibited. This also includes the prohibition of treatment of non-residents which varies depending on the Member State of their place of residence.

4 — See, inter alia, judgments in *Biehl* (C-175/88, EU:C:1990:186, paragraph 12) and in *Schumacker* (C-279/93, EU:C:1995:31, paragraph 23).

5 — See, inter alia, judgments in *Sotgiu* (152/73, EU:C:1974:13, paragraph 11) and in *Schumacker* (C-279/93, EC:C:1995:31, paragraphs 26 to 28).

24. The Court has nevertheless, with regard to the question whether the fundamental freedoms also prohibit differentiation between nationals of different Member States, up to now given varying signals.

25. On the one hand, in the judgment in *Columbus Container Services*, it rejected the view that unequal treatment depending on the Member State of establishment alone constitutes an impairment of freedom of establishment under Article 49 TFEU.[6] In holding that there was no restriction on that freedom, the Court rather emphasised, on the contrary, that there was equal treatment of the cross-border situation examined with the national situation.[7] Moreover, with regard to free movement of capital under Article 63(1) TFEU, which also includes third countries, the Court does not view the differing treatment of capital gains, depending on the third country in which they originate, as falling under the protection of that provision.[8]

26. On the other hand, also in the context of free movement of capital, in the judgment in *Orange European Smallcap Fund*, the Court found an impairment of the fundamental freedom by reason of the unequal treatment of various other Member States by the State of origin.[9] Accordingly, in further decisions, both in the context of free movement of capital and in that of freedom of establishment, the Court has at least examined whether the differing treatment of various non-residents constitutes an impairment of the fundamental freedom in the specific case in question.[10]

27. I am of the view that freedom of movement for workers prohibits in principle not only adverse unequal treatment of non-residents vis-à-vis residents, but also differentiation between non-residents of different Member States.

28. In that respect, I concur with Advocates General Léger and Mengozzi, who, in regard to freedom of establishment, have already pointed out that it would be contrary to the notion of the 'single market'[11] and that there would be the 'risk of fragmentation of the common market',[12] if a difference in the treatment of the establishment of companies depending on the Member State were to be allowed. A comparable result with regard to freedom of movement for workers would be liable to occur if the Member States were allowed to give preference to workers from certain Member States over workers from other Member States.

29. Under Article 26(2) TFEU, the internal market is to comprise an 'area without internal frontiers'. That objective can be attained only if all workers in the European Union are treated equally. Any differentiation between workers on the basis of their State of origin erects new borders even if no foreign worker is placed in a position which is inferior to that of national workers. That is because support for workers from only certain Member States automatically worsens the conditions of competition for workers from the other Member States. In that respect, the internal market may also be impaired by a scheme such as the one at issue here, which in itself promotes the free movement of workers within the European Union.

30. A tax advantage such as that provided by the Netherlands, which makes recourse to it dependent on the worker's foreign pace of residence being at a certain distance from the national border, therefore impairs freedom of movement for workers. Such an impairment is permissible only if it applies to situations which are not objectively comparable to each other (see under B, immediately below), or if it is justified by an overriding reason in the public interest (see under C, further below).

6 — See judgment in *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 50 and 51).

7 — See judgment in *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 54).

8 — Judgment in *Haribo* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 48).

9 — Judgment in *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraph 56).

10 — See judgments in *D.* (C-376/03, EU:C:2005:424, paragraphs 53 to 63) and *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraphs 82 and 83).

11 — See Opinion of Advocate General Léger in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:278, points 79 and 80).

12 — See Opinion of Advocate General Mengozzi in *Columbus Container Services* (C-298/05, EU:C:2007:197, points 117 and 118).

B – *Objective comparability of the situations*

31. The next point to be examined is therefore whether the situation of a worker such as Mr Sopora, who lives at a distance of less than 150 kilometres from the Netherlands border, and that of a worker who lives at a distance of more than 150 kilometres from that border are objectively comparable. According to settled case-law, the objective comparability of situations must be examined having regard to the aim pursued by the provision at issue.[13]

32. The Kingdom of the Netherlands has submitted in this regard that the two groups are not comparable as regards the extraterritorial expenses which they respectively incur and which are intended to be taken into account by the flat-rate scheme. Those expenses, it maintains, are dependent on distance.

33. However, the two groups are not manifestly treated differently for any good reason.[14] The extraterritorial expenses are, in particular, different only in degree if the situations of workers who live at a distance only slightly more or less than 150 kilometres from the Netherlands border respectively are compared. Whether, despite the great similarity of those two groups, a differentiation on the basis of a rigid limit of 150 kilometres is permissible can be adequately assessed only if the proportionality of such a demarcation can also be assessed in the context of the examination of a justification for the impairment of freedom of movement for workers.

34. The impairment of freedom of movement for workers at issue here therefore applies to situations which are objectively comparable with one other.

C – *Justification*

35. It therefore remains to be examined whether the impairment of freedom of movement for workers at issue here is justified by an overriding reason in the public interest.

36. According to the information provided by the referring court, the flat-rate scheme is intended to produce a wage cost subsidy for national employers who need to recruit from abroad workers with certain qualifications who cannot be found on the Netherlands labour market. The 150-kilometre condition was added later in order to exclude recourse to the flat-rate scheme in cases where a worker is able to commute from his foreign residence to his place of work in the Netherlands and therefore has no, or only low, extraterritorial expenses. The Netherlands legislature thus also intended to counteract distortions of competition between national and foreign workers in the border area. In this regard, the Kingdom of the Netherlands has added that Netherlands employers based close to the border would have given preference to foreign workers because they could have paid them a lower salary than national workers on account of the tax advantage of the flat-rate scheme.

37. First, I must state that, in the present case, no justification can be found in the promotion of free movement for workers, as considered by the referring court. The free movement of workers is impaired, not by the supportive flat-rate scheme as such, but by the additional 150-kilometre condition, which specifically excludes certain persons from that support. That condition alone distinguishes indirectly between the nationals of different Member States. A ground of justification is therefore also required for that condition.

13 — See, inter alia, judgments in *X Holding* (C-337/08, EU:C:2010:89, paragraph 22) and in *SCA Group Holding and Others* (C-39/13, C-40/13 and C-41/13, EU:C:2014:1758, paragraph 28).

14 — See, in this regard, my Opinion in *Commission* v *United Kingdom* (C-172/13, EU:C:2014:2321, point 29).

1. Prevention of tax avoidance

38. In this regard, the Commission has cited the combatting of tax evasion as constituting a ground of justification. In the Commission's view, the 150-kilometre condition prevents tax avoidance because it prevents, in principle, an unreasonable estimate of expenses for workers who live at a distance of less than 150 kilometres from the Netherlands border.

39. According to settled case-law, the aim of preventing tax avoidance may indeed justify a national scheme where it relates specifically to purely artificial arrangements designed to avoid application of the tax provisions of the Member State concerned. [15]

40. In the present case, however, no tax avoidance can be identified in the situation where a worker who lives at a distance of less than 150 kilometres from the Netherlands border has recourse to the flat-rate scheme. It is not clear what factual situation a worker such as Mr Sopora is creating purely artificially in this context. In particular, he also does not claim that he incurs any specific amount of extraterritorial expenses, but merely wishes, like other workers, to have recourse to a flat-rate scheme which is applicable precisely irrespective of the actual amount of the expenses.

2. Prevention of competitive disadvantages for national workers

41. The Kingdom of the Netherlands has further contended that the 150-kilometre condition is justified by the aim of preventing competitive disadvantages for Netherlands workers on the domestic labour market.

42. The prevention of distortions of competition may, in principle, be regarded as an overriding reason in the public interest. As is already clear from the preamble to the TFEU, 'fair competition' is an essential objective of the Treaties. The avoidance of distortions of competition is, moreover, of outstanding importance, specifically with regard to the tax laws of the Member States. In this respect, that objective is pursued by, inter alia, the prohibition of discriminatory taxation under Article 110 TFEU, the power to harmonise indirect taxation under Article 113 TFEU and the prohibition of State aid under Article 107 TFEU.

43. However, irrespective of whether the avoidance of disadvantages for *national* workers may also be a justification for treating workers from other Member States differently according to their State of origin, it is not apparent in the present case, according to the legal situation as described, that the 150-kilometre condition is necessary in order to attain that objective. The flat-rate scheme, namely, applies, according to the information supplied by the national court, only in the case where no adequate alternative for the post in question can be found in the Netherlands labour market. [16] If the Netherlands labour market is understood to mean the workers resident in the Netherlands, the flat-rate scheme should not, in any case, substantially affect competition between resident and non-resident workers by virtue of that condition.

44. Should the referring court, which alone is responsible for the interpretation of national law and the determination of its factual effects, come to a different view of the competitive position, the following observations would apply accordingly to the further examination of this ground of justification.

15 — See, with regard to freedom of establishment, the judgment in *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 31 and the case-law cited) and, with regard to the free movement of capital, the judgment in *Itelcar* (C-282/12, EU:C:2013:629, paragraph 34 and the case-law cited).

16 — See point 7 above.

3. Prevention of distortions of competition among non-resident workers

45. The aspect of prevention of distortions of competition may also be of importance in another form in the present case.

46. The 150-kilometre condition serves the — prima facie — understandable purpose of not granting the benefit of the flat-rate scheme in cases where a worker is able to commute from his foreign place of residence to his place of work in the Netherlands and therefore incurs no, or only low, extraterritorial expenses because, in particular, he does not require a second home in the Netherlands. It is thus sought to adapt the tax exemption for the employer's reimbursements in respect of his employee's extraterritorial expenses to the expenses actually incurred.

47. The differentiation therefore serves the aim of avoiding excessive advantages of the flat-rate scheme for certain workers and thus also of preventing distortions of competition within the group of non-resident workers. That aim can, in principle, be regarded as an overriding reason in the public interest.

a) Appropriateness

48. The 150-kilometre condition should first be appropriate for achieving that aim, and should exclude those workers with lower extraterritorial expenses from the application of the flat-rate scheme.

49. In the present case, the Netherlands legislature decided, for that purpose, to assume, in the case of a distance of less than 150 kilometres from a worker's place of residence to the border, that the worker will not maintain a second home in the Netherlands and that he therefore has lower extraterritorial expenses to bear. In the case of workers who live further away from the Netherlands border, it is, by contrast, assumed that they will have to set up a second home in the Netherlands and thereby incur higher extraterritorial expenses. The Netherlands legislature thus intends, for the sake of simplicity, to ascertain the decisive factual situation, namely, the existence of a second home in the Netherlands and the expenses arising from that, with the aid of another factual situation, namely, the distance of the first home from the Netherlands border.

50. That simplifying rule is capable of excluding from the flat-rate scheme those non-resident workers who do not maintain a second home in the Netherlands and therefore have lower extraterritorial expenses. This is because it may be assumed that workers who live at a distance of more than 150 kilometres from the Netherlands border will not be able to commute daily to their place of work and will therefore need to maintain a second home or to move house. If all other workers are excluded from the flat-rate scheme, this will in any case affect all workers who commute daily to their place of work and therefore have lower extraterritorial expenses.

b) Proportionality of the simplifying rule

51. However, the question arises as to whether or not the simplifying rule goes beyond what is necessary in order to realise the objective of preventing distortions of competition. That is because the scheme clearly also excludes from the flat-rate scheme such workers who cannot commute daily to their place of work and therefore need to maintain a second home in the Netherlands because, although the distance from their place of residence to the Netherlands border is indeed less than 150 kilometres, the distance to their place of work in the Netherlands is much greater.

52. In principle, it is permissible for a national legislature, for the sake of simplicity, to determine as decisive a more easily verifiable distinguishing criterion instead of a factual situation which is more difficult to ascertain. Even though administrative difficulties *alone* cannot justify an impairment of a fundamental freedom,[17] the Kingdom of the Netherlands has nevertheless correctly pointed out that, according to the case-law, in the context of the justification of a national scheme, its ease of management and supervision[18] and/or the administrative burden for the tax authorities[19] must be taken into account. The Court thus recognises in principle that the burden of administrative enforcement also plays a role in the internal market. In the present case, an alternative scheme, under which it has to be ascertained separately in each of a multitude of cases whether a non-resident worker actually maintains and uses a second home in the Netherlands, would involve an increased administrative burden both for the worker and for the tax administration. In addition, such a scheme would also be difficult for the tax administration to monitor.

53. However, such simplifying rules using an easily verifiable distinguishing criterion must — in this respect comparably to the covert forms of discrimination[20] — lead essentially to the same result by the application of the alternative distinguishing criterion. In the present case, the question therefore arises whether the 150-kilometre condition is capable of reflecting in essence the extent of a worker's extraterritorial expenses.

54. It must first be made clear that, in the same way as, in the context of indirect discrimination, there need not in all cases be a correlation between, for example, place of residence and nationality,[21] it cannot be required, in the case of a simplifying rule, that there must not be any cases in which the legislative assumption proves to be incorrect. The examples submitted by the Commission, in which, despite a distance from a worker's place of residence to the Netherlands border of less than 150 kilometres, it cannot be assumed that the worker commutes daily to work, are thus not sufficient to establish that the distinguishing criterion chosen by the legislature is inappropriate. It is, on the contrary, part of the essence of a simplifying rule that there will also be cases in which the chosen distinguishing criterion does not reflect the desired factual situation.

55. However, the last-mentioned cases ought to be merely isolated cases. The criterion chosen in the context of a simplification must, as a rule, reflect a correct understanding of the factual situation. A simplifying rule is therefore, in principle, proportionate only if it leads, in the vast majority of cases, to the same result as would have been achieved without the simplification. I have already set out comparable requirements for a finding of covert discrimination.[22]

56. In this respect, there are doubts with regard to the 150-kilometre condition here at issue, which, however, can ultimately be resolved by the referring court only on the basis of its ascertainment of the relevant facts.[23]

57. Thus, the distance from a worker's place of residence to the Netherlands *border* in the case of the Kingdom of the Netherlands, a country which measures approximately 300 kilometres from north to south and approximately 180 kilometres from west to east, has only limited meaningfulness in relation to the distance from a worker's place of residence to his *place of work* in the Netherlands. However,

17 — See, to that effect, judgments in *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 45), *Jäger* (C-256/06, EU:C:2008:20, paragraph 55) and *van Caster* (C-326/12, EU:C:2014:2269, paragraph 56 and the case-law cited).

18 — See judgment in *Commission* v *Italy* (C-110/05, EU:C:2009:66, paragraph 67).

19 — See judgment in *X* (C-498/10, EU:C:2012:635, paragraph 51).

20 — See point 16 above.

21 — See also, to that effect, judgment in *Erny* (C-172/11, EU:C:2012:399, paragraph 41).

22 — See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, points 37 to 47).

23 — See, also with regard to indirect discrimination, the judgment in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraphs 39 to 41).

the latter distance alone is decisive for the question whether a worker will still commute, and thus also for the amount of his extraterritorial expenses. Consequently, a multitude of cases could exist in which the distinguishing criterion chosen by the Netherlands legislature is at variance with the factual situation to be reflected.

58. The Kingdom of the Netherlands, on the other hand, has objected that the place of work may sometimes be difficult to ascertain, because certain workers do not have a fixed place of work, but have only constantly changing places of work or, in the case of multinational companies, in some instances only places of work which are unknown to the tax administration. However, these administrative difficulties appear to me to be comparatively minor, and so would not justify the use of a distinguishing criterion which in many cases does not reflect the decisive factual situation. This is true, in particular, against the background that, in the context of the flat-rate scheme — as the Commission stated, without being contradicted, at the hearing –, the distance from a worker's place of residence outside the Netherlands is checked only once, at the start of his activity in the Netherlands.

c) Proportionality of the legal consequence

59. In addition, the simplifying rule could also, as regards its legal consequence, go beyond what is necessary in order to achieve the aim of preventing distortions of competition within the group of non-resident workers.

60. That is because, for non-resident workers close to the border, the flat-rate scheme could also have been restricted in such a way that, for them, the percentage of the taxable base for wages tax of 30% was reduced to a lower value, instead of excluding them completely from a flat-rate scheme. Non-resident workers living close to the border would thereby actually have retained the advantages of the flat-rate scheme in so far as they would not have had to produce proof of their expenses up to a certain amount and to a certain extent expenses not even incurred at all would also have been considered for taxation purposes by the flat-rate scheme.[24] A gentler means of preventing distortions of competition between non-resident workers would thus have been available, in that the extraterritorial expenses of all non-resident workers would be estimated for the purposes of tax-free reimbursement by the employer by means of a flat-rate scheme, albeit in variable amounts depending on the distance of their place of residence from the border.

61. The refusal of such a reduced flat-rate scheme for non-resident workers living close to the border would be proportionate only if the vast majority of such workers essentially incurred no extraterritorial expenses at all. Only in that case would it be necessary, in order to prevent distortions of competition, to exclude workers living close to the border even from the advantages of a less generous flat-rate scheme. This question too must be considered by the referring court on the basis of the facts and the national legal situation.

D – *Result*

62. Consequently, a national scheme which makes a tax advantage such as the flat-rate scheme here in question subject to a provision such as the 150-kilometre condition at issue will be compatible with Article 45 TFEU only if, firstly, the distinguishing criterion of the distance of the place of residence from the border identifies, in the vast majority of cases, non-resident workers who are able to commute daily to their place of work, and, secondly, such workers essentially incur no extraterritorial expenses within the meaning of the flat-rate scheme. Whether those requirements are satisfied is a matter which must be clarified by the referring court.

24 — See point 17 above.

VI – **Conclusion**

63. I therefore propose that the questions referred by the Hoge Raad der Nederlanden be answered as follows:

Freedom of movement for workers under Article 45 TFEU does not preclude a national scheme such as that at issue in the main proceedings — which allows incoming workers tax-free reimbursement of extraterritorial expenses and a worker who, in the period prior to his activities in that Member State, lived at a distance of more than 150 kilometres from the border of that Member State can be granted tax-free reimbursement of expenses fixed at a flat rate, even if the amount of the reimbursement exceeds the actual extraterritorial expenses, whereas for a worker who, during that period, lived at a smaller distance from that Member State the tax-free reimbursement is limited to the amount of the actual verifiable extraterritorial expenses — if, in the vast majority of cases, the latter workers are able to commute daily to their place of work in the Netherlands and essentially incur no extraterritorial expenses.