Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 28 January 2016[1]

Case C-122/15

C(Request for a preliminary ruling from the

Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Tax legislation — National law on income tax — Article 21(1) of the Charter of Fundamental Rights — Directive 2000/78/EC — Discrimination on the ground of age — Supplementary tax on income from a retirement pension)

I – **Introduction**

1. The present case may open a new chapter in the influence of EU law on the income tax legislation of the Member States. In the context of a reference from the highest Finnish administrative court, the Court is asked to answer the important question of whether the prohibition of age discrimination laid down in EU law also affects national income tax legislation.

2. For it is that prohibition that is being relied on by a Finnish taxpayer who is subject to a supplementary tax levied in Finland exclusively on income from retirement pensions. Is the EU-law prohibition of discrimination on the ground of age, which is governed by the Charter of Fundamental Rights of the European Union and a directive, applicable at all in such a case and, if so, does it prevent a Member State from imposing a higher rate of taxation on retirement pension income?

3. The question of whether the EU-law prohibition of age discrimination is applicable to the income tax legislation of the Member States forms the subject matter of another case currently pending before the Court.[2] Although that case, originating in the Netherlands, concerns an entirely different provision of income tax law, it nevertheless underscores the importance of the guidance which the Court is called upon to provide in the present case.

1 — Original language: German.

2 — *de Lange* (C-548/15).

II – **Legal framework**

A – *EU law*

4. Article 21(1) of the Charter of Fundamental Rights of the European Union of 7 December 2000, in the version adapted in Strasbourg on 12 December 2007[3] ('the Charter'), provides, in extract, as follows:

'1. Any discrimination based on any ground such as … age … shall be prohibited.'

5. With regard to its 'field of application', Article 51(1) of the Charter provides:

'1. The provisions of this Charter are addressed … to the Member States only when they are implementing Union law.'

6. Article 13 of the Treaty establishing the European Community in the version of the Treaty of Amsterdam[4] ('EC'), now Article 19 TFEU,[5] granted the Council the following power:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council … may take appropriate action to combat discrimination based on … age …'

7. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[6] ('Directive 2000/78') was adopted on the basis of Article 13 EC.

8. With regard to its 'scope', Article 3 of Directive 2000/78 provides:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…

2. …

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

…'

3 — OJ 2012 C 326, p. 391.

4 — OJ 1997 C 340, p. 173.

5 — Treaty on the Functioning of the European Union (OJ 2012 C 326, p. 47).

6 — OJ 2000 L 303, p. 16.

9. Article 16 of Directive 2000/78 provides:

‘Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

…’

10. Article 2 of Directive 2000/78 contains the following definitions:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having … a particular age … at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) …

…’

11. Article 1 of Directive 2000/78, to which Article 2(1) refers, reads, in extract, as follows:

‘The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of … age … as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

12. Article 6 of Directive 2000/78 provides as follows under the heading ‘Justification of differences of treatment on grounds of age’:

‘1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

…’

B – *National law*

13. In Finland, income tax is levied in accordance with the Law on income tax (Tuloverolaki). In the version of that law amended with effect from 1 January 2013 by the Law amending the Law on income tax (Laki tuloverolain muuttamisesta) (785/2012) (‘the Finnish Law on income tax’), Paragraph 124(1) and (4) imposes a supplementary tax on income from a retirement pension.

14. The supplementary tax is charged at a rate of 6%, provided that the pension income minus the pension allowance is greater than EUR 45 000. It is to be paid in addition to the income tax payable on that income under the generally applicable progressive income tax scale.

III – **Dispute in the main proceedings**

15. The dispute in the main proceedings concerns the assessment to income tax of C ('the taxpayer') in respect of the 2013 assessment period.

16. The taxpayer is a Finnish national living in Finland. In the year 2013, he received income of approximately EUR 460 000 from a retirement pension paid by a Finnish company. The amount of his pension was calculated on the basis of his last 10 years of employment. During that period, the taxpayer had worked for a Swedish company, both in Sweden and in Finland. The taxpayer's pension was financed in part from his employer's pension fund.

17. The Finnish tax authorities levied supplementary tax at 6% on the taxpayer's pension income, in accordance with Paragraph 124(1) and (4) of the Finnish Law on income tax. The taxpayer took legal action against that measure, since, in his view, the supplementary tax constitutes prohibited discrimination on the ground of age.

IV – **Procedure before the Court**

18. The Korkein hallinto-oikeus (Supreme Administrative Court), before which the dispute has now been brought, considers the interpretation of EU law to be crucial to the resolution of the dispute and, on 10 March 2015, referred the following questions to the Court under Article 267 TFEU:

'(1) Are the provisions of Article 3(1)(c) of Directive 2000/78 to be interpreted as meaning that national legislation such as the provisions on supplementary tax on pension income of the first and fourth subparagraphs of Paragraph 124 of the Finnish Law on income tax fall within the scope of EU law and the provision concerning the prohibition of discrimination on grounds of age laid down in Article 21(1) of the Charter should consequently be applied in the present case?

(2) If the first question is answered in the affirmative, are Article 2(1) and (2)(a) or (b) of Directive 2000/78 and the provisions of Article 21(1) of the Charter to be interpreted as precluding national legislation such as the provisions of the first and fourth subparagraphs of Paragraph 124 of the Finnish Law on income tax concerning the supplementary tax on pension income, under which the pension income received by a natural person, the receipt of which is based at least indirectly on the person's age, is burdened in certain cases with more income tax than would be charged on the equivalent amount of employment income?

(3) If those provisions of Directive 2000/78 and the Charter preclude national legislation such as the supplementary tax on pension income, must it also be assessed in the present case whether Article 6(1) of that directive is to be interpreted as meaning that national legislation such as the supplementary tax on pension income may nevertheless be regarded in terms of its aim as objectively and reasonably justified within the meaning of that provision of the directive, in particular on the basis of a legitimate employment policy, labour market or vocational training objective, since the purpose expressed in the preparatory materials for the Finnish Law on income tax is, by means of the supplementary tax on pension income, to collect tax revenue from recipients of pension income who are capable of paying, to narrow the difference of tax rates between pension income and employment income, and to improve incentives for older persons to continue working?'

19. Written observations on those questions were submitted before the Court by the taxpayer, Ireland, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the European Commission. At the hearing of 10 December 2015, oral argument was presented by the taxpayer, the Republic of Finland, the Kingdom of Sweden and the Commission.

V – **Legal assessment**

20. By its first question, the referring court wishes to ascertain in essence whether Directive 2000/78 or Article 21(1) of the Charter is applicable in the case of the dispute in the main proceedings.

21. It is my conviction that this question must be answered in the negative. National legislation which lays down the rate of tax applicable to income from a retirement pension does not fall within the scope of either Directive 2000/78 (see A below) or the Charter (see B below). For that reason, moreover, there is no need to answer the second and third questions referred.

A – *Scope of Directive 2000/78*

22. According to the Court's case-law, Directive 2000/78 gives specific expression to the EU-law principle of non-discrimination on grounds of age [7] that follows from the Charter and from the general principles [8] forming part of EU law in accordance with Article 6(3) TEU. [9] Within the scope of Directive 2000/78, the Member States must therefore comply with the requirements which that directive lays down. [10]

23. The scope of Directive 2000/78 is defined in Article 3 thereof. The question that arises in the present case is whether the taxation of income from a retirement pension accrued from previous employment is covered by paragraph 1(c) of that provision. This states that the directive is to apply to all persons 'in relation to … employment and working conditions, including … pay'.

24. Two questions therefore arise: first, does the pension received by the taxpayer in the present case constitute 'pay'; and, secondly, is the *taxation* of that pension to be regarded as legislation in relation to pay within the meaning of Article 3(1)(c) of Directive 2000/78?

1. Retirement pension as pay

25. It is settled case-law that the concept of pay within the meaning of Article 3(1)(c) of Directive 2000/78 is defined in the light of recital 13 of that directive read in conjunction with Article 157 TFEU (formerly Article 141 EC), which establishes the principle of equal pay for male and female workers. As a result, account is also taken of the restriction laid down in Article 3(3) of Directive 2000/78, which states that that directive does not apply to payments made by State schemes. [11]

7 — See, inter alia, the judgments in *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 21); *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 38); *Schmitzer* (C-530/13, EU:C:2014:2359, paragraphs 22 and 23); and *O* (C-432/14, EU:C:2015:643, paragraph 21).

8 — See to that effect the judgment in *Mangold* (C-144/04, EU:C:2005:709, paragraphs 74 and 75).

9 — Treaty on European Union (OJ 2012 C 326, p. 13).

10 — See the judgments in *Schmitzer* (C-530/13, EU:C:2014:2359, paragraph 23) and *Felber* (C-529/13, EU:C:2015:20, paragraph 16).

11 — See, inter alia, the judgments in *Maruko* (C-267/06, EU:C:2008:179, paragraphs 40 and 41); *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 25); and *Felber* (C-529/13, EU:C:2015:20, paragraph 20).

26. The first subparagraph of Article 157(2) TFEU defines 'pay', inter alia, as 'any other consideration … which the worker receives directly or indirectly, in respect of his employment, from his employer'. The Court has clarified the definition of that term as comprising any consideration, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.[12] Benefits paid after the termination of the employment relationship are also capable of constituting consideration, therefore.[13]

27. In any event, in so far as the employer grants benefits from a pension fund internal to its organisation, as it clearly does here, the aforementioned conditions are satisfied. It also follows from Article 6(2) of Directive 2000/78 that the entitlement to retirement benefits under occupational social security schemes falls within the scope of the directive.

28. The extent to which the other components of the taxpayer's retirement pension can also be included in the concept of pay within the meaning of the first subparagraph of Article 157(2) TFEU cannot be assessed with absolute certainty on the basis of the information supplied by the referring court. If appropriate, therefore, the referring court would have to go on to examine this question itself.

29. For the purposes of the further examination of the question referred, however, it must be stated that the retirement pension received by the taxpayer in the present case constitutes, at least in part, pay within the meaning of Article 3(1)(c) of Directive 2000/78.

2. Taxation of the pay

30. The next, decisive, question is whether the *taxation* of that pay also falls within the scope of Directive 2000/78 under Article 3(1)(c).

a) Wording

31. The German-language version of that provision, at least, is framed in broad terms. Article 16(a) read in conjunction with Article 3(1)(c) of Directive 2000/78 requires the Member States to abolish any discriminatory legislation 'in relation to', inter alia, pay.[14] National legislation which taxes such pay clearly exhibits such a relationship.

b) Comparison with other prohibitions of discrimination

32. Moreover, so far as concerns other provisions of EU law that lay down prohibitions of discrimination in relation to working conditions, the Court has extended their scope to the taxation of pay.

33. Thus, in the context of freedom of movement for workers, Article 45(2) TFEU provides for the abolition of any discrimination based on nationality between workers of the Member States as regards, inter alia, remuneration. The Court has consistently 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.[15] Although that extension of the prohibition on discrimination in

12 — See the judgments in *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 26); *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 26); and *Felber* (C-529/13, EU:C:2015:20, paragraph 21).

13 — See the judgments in *Barber* (C-262/88, EU:C:1990:209, paragraph 12) and *Maruko* (C-267/06, EU:C:2008:179, paragraph 44).

14 — The French-language version of Article 3(1)(c) of Directive 2000/78 has a slightly narrower wording, inasmuch as it refers to *conditions* of pay ('les conditions … de rémunération'); even that form of words still accommodates the taxation of pay, however.

15 — See, inter alia, the judgments in *Biehl* (C-175/88, EU:C:1990:186, paragraph 12); *Schumacker* (C-279/93, EU:C:1995:31, paragraph 23); and *Kieback* (C-9/14, EU:C:2015:406, paragraph 20).

connection with the freedom of movement for workers to the taxation of pay is supported by an explicit provision in Article 7(2) of Regulation (EU) No 492/2011,[16] case-law would seem to indicate that it also follows directly from the interpretation of the concept of 'remuneration' in Article 45(2) TFEU.[17]

34. In the context of the prohibition of discrimination on the ground of sex, too, the Court has opted for an interpretation to the effect that working conditions also include taxation of the activity. It thus held, in relation to the previously applicable provisions of Article 5(1) of Directive 76/207/EEC[18] that working conditions, in particular the conditions governing dismissal, in connection with which the Member States are required to observe the prohibition of discrimination on the ground of sex, also include a national tax provision that grants different tax advantages in respect of redundancy payments.[19]

c) Spirit and purpose

35. Extending the scope of Directive 2000/78 to the taxation of pay would also be fully consistent with the objectives pursued by that directive.

36. Under that directive, the prohibition of various forms of discrimination is not simply a value in itself,[20] of crucial significance from the point of view of equal opportunities, full participation in economic, cultural and social life and the realisation of potential.[21] The prohibitions of discrimination laid down in Directive 2000/78 are also intended to ensure that certain objectives pursued by the European Union, that is to say a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons, are not undermined.[22]

37. All of those objectives can also be undermined by the discriminatory taxation of pay. After all, the amount of money that an employee ultimately has left from his pay is dictated entirely by the tax levied on it.

d) Restriction to the areas of competence conferred on the Community

38. However, the very first provision contained in Article 3(1), which defines the scope of Directive 2000/78, is a restriction to the effect that the directive is to apply only 'within the limits of the areas of competence conferred on the Community'. That restriction is based on an identical limitation contained in the legal basis for the directive, Article 13 EC.

16 — 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 (codification) (OJ 2011 L 141, p. 1); the legislation previously applicable was Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition: Series I Volume 1968(II), p. 475).

17 — See, for example, the judgment in *Sopora* (C-512/13, EU:C:2015:108, paragraph 22), which makes no reference to Regulation (EU) No 492/2011 in this regard.

18 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40); the applicable legislation in this field is now Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

19 — Judgment in *Vergani* (C-207/04, EU:C:2005:495, paragraphs 25 to 29).

20 — See recital 5 of Directive 2000/78.

21 — See recital 9 of Directive 2000/78.

22 — See recital 11 of Directive 2000/78.

39. The scope of Directive 2000/78 cannot therefore extend beyond the areas of competence conferred on the Community. In the light of that restriction, the question that arises in the present case is whether the taxation of pensions is one of the areas of competence conferred on the Community (now the European Union).

40. It is true that, in its settled case-law, the Court has repeatedly held that direct taxation — which also includes, among other forms of income tax, tax levied on income from pensions such as that at issue in the present case — falls within the competence of the *Member States*.[23]

41. That is not entirely the case, however.

i) Special competences in the field of direct taxation

42. Scattered throughout the Treaty is a whole series of provisions which have conferred on the Community certain special competences in the field of direct taxation too.

43. Thus, for example, in the context of environmental policy, the first indent of Article 175(2) EC (now Article 192(2)(a) TFEU) gave the Community the power to legislate by adopting 'provisions primarily of a fiscal nature', including direct taxes. The same is now also true, in accordance with Article 194(3) TFEU, of the European Union's energy policy.

44. These and other special competences enjoyed by the Community and the European Union in the field of direct taxation[24] are, however, irrelevant in the present case, since none of them creates a general power to adopt legal acts in the area of the taxation of pension income or, more specifically, in relation to the general rate of tax.[25] To this extent, the situation is different from that in the case of indirect taxes, with respect to which Article 93 EC (now Article 113 TFEU) conferred a general competence on the Community, and different also from that in the case of social security benefits, which come under the Community's general competence in matters of social security, in accordance with the first indent of Article 137(3) EC (now Article 153(1)(c) TFEU).[26]

ii) General competence in matters relating to the internal market

45. In addition to the aforementioned special competences in the field of direct taxation, however, the Community was also able, in accordance with Article 94 EC (now Article 115 TFEU), to issue directives in any areas of law 'directly affect[ing] the establishment or functioning of the internal market'. Among the directives adopted on that basis were several that govern aspects of a number of direct taxes levied by the Member States, although not the taxation of pensions.[27]

23 — See, inter alia, the judgments in *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21); *Manninen* (C-319/02, EU:C:2004:484, paragraph 19); *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 28).

24 — See Article 182(5) in conjunction with Article 179(2) TFEU as regards the removal of fiscal obstacles to research cooperation, Article 223(2) TFEU in relation to the taxation of Members of the European Parliament, and Article 12(1) of Protocol (No 7) on the privileges and immunities of the European Union, annexed to the TEU, TFEU and TEAEC (OJ 2012 C 326, p. 266), in relation to the taxation of the servants of the European Union.

25 — There is no need to consider here whether the reference in Article 3(1) of Directive 2000/78 to the areas of competence conferred on the 'Community' even includes at all the competences exercised by the European Union, laid down for the first time in the TFEU, on the ground, for example, that that term is to be given a dynamic construction.

26 — Even though the detailed determination of those benefits falls within the competence of the Member States, see to the foregoing effect the judgment in *Maruko* (C-267/06, EU:C:2008:179, paragraph 59).

27 — Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) (now Directive 2009/133/EC); Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6) (now Directive 2011/96/EU); Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38); and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

46. On condition that the taxation of pension income by the Member States directly affects the functioning of the common market within the meaning of Article 94 EC, the Community could have adopted directives in this area too. The taxation of pensions is likely to have such an effect particularly in situations involving a cross-border dimension. Indeed, Article 94 EC might well have formed the basis for the adoption of a more extensive harmonisation of the taxation of pensions aimed at creating equal conditions of competition.

47. However, I consider that the legislative powers enjoyed by the Community within the context of the common market, as provided for in Article 94 EC, are not in themselves sufficient to support the view that the matter at issue here constitutes a competence conferred on the Community within the meaning of Article 13 EC and Article 3 of Directive 2000/78.

48. After all, Article 94 EC potentially covers all areas of law. If, therefore, Article 94 EC were deemed to be sufficient to sustain the presence of a competence conferred on the Community under Article 13 EC, the European Union could, by extension, adopt prohibitions on discrimination in all areas of law. This, however, would divest the qualification 'within the limits of the powers conferred by [the Treaties] upon the Union' of its practical effectiveness, since it would be entirely inconsequential.

49. The Court's case-law already contains some evidence to support an interpretation of Article 13 EC as meaning that Article 94 EC confers competence on the Community under that article only to a limited extent.

50. Thus, in its judgment in *Specht*, the Court examined whether Directive 2000/78 extends beyond the limits of the competence exercised by the European Union because Article 153(5) TFEU (formerly Article 137(6) EC) excludes the regulation of pay from the competence enjoyed by the European Union in the field of social policy.[28] In so doing, however, the Court did not give any consideration in the grounds of that judgment to whether the reason the restriction contained in Article 153(5) TFEU has no bearing on the scope of Directive 2000/78[29] is that the European Union may exercise competence over the areas of law excluded from its remit in the context of social policy by virtue of the internal market powers which it enjoys under Articles 114 TFEU and 115 TFEU (formerly Articles 95 EC and 94 EC).

51. Furthermore, in the judgment in *CHEZ Razpredelenie Bulgaria*, the Court recently had to consider the similar question of how to interpret the restriction of the scope of Directive 2000/43/EC[30] to the powers conferred on the Community. In the grounds of that judgment, the Court held that the presence of those powers in that case was beyond question because, in the area of law concerned, there was already EU legislation in place which had been adopted, inter alia, on the basis of the internal market competence provided for in Article 95 EC (now Article 114 TFEU).[31] The Court appears to have regarded as the decisive factor in that regard not the question whether the Community or the European Union was empowered in the abstract by its internal market competence, but the question whether that competence was also exercised in practice through the adoption of legal acts.

52. I consider this to be a suitable approach in the case of the internal market competence provided for in Article 94 EC (now Article 115 TFEU) too. There is hardly any restriction, from the point of view of substance, on the competence enjoyed by the Community or the European Union under that provision. The number of areas of law capable of directly affecting the internal market is incalculably

28 — Judgment in *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraphs 32 to 35).

29 — See also to this effect the Commission's Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (COM[1999] 565 final), explanatory notes on Article 3.

30 — Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

31 — Judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 44).

large. Moreover, the determination of whether or not such an effect is present will to a large extent fall within the discretion of the legislature alone. At a procedural level, however, the substantive scope of the competence in matters affecting the internal market as provided for in Article 94 EC is limited by the requirement of unanimity within the Council. To some extent, this enables the Member States meeting within the Council to regulate areas of law which do not in principle fall within the competence of the European Union. However, the restriction of the internal market competence by the requirement of unanimity cannot be given suitable expression in the context of Article 13 EC (now Article 19 TFEU). For that reason, any competence on the part of the Community or the European Union by virtue of Article 94 EC should be assumed only where the Council has already taken action on that basis in a particular area of law.

53. Since, however, there was not at the time when Directive 2000/78 was adopted and there is not now a directive in the field of the taxation of pensions, the latter, by extension, does not under any circumstances constitute an area of competence conferred on the Community within the meaning of Article 3(1) of Directive 2000/78. The scope of that directive does not therefore extend to the taxation of pensions.

e) Intention of the legislature

54. Furthermore, it must be held that, in adopting Directive 2000/78, the legislature did not even intend to lay down any prohibitions on discrimination in the area of tax law, even though it would have been empowered to do so under Article 13 EC.

55. First, this is apparent to some extent not least from the title of Directive 2000/78, which provides that its purpose is to combat discrimination only '*in*' employment and occupation.

56. Secondly, of all the 37 recitals of Directive 2000/78, not one of them gives any indication that that directive is also meant to apply in the field of national taxation. Such silence would scarcely make sense if the legislature had really intended the directive to entail such far-reaching consequences for the right of direct taxation enjoyed by the Member States.

57. Thirdly, the explanations given in the proposal for the directive also do not contain any reference to tax law. In so far as the Commission refers to areas of competence conferred on the Community in that proposal, it does so only in relation to the Community's powers in the area of social policy as provided for in Article 137 EC (now Article 153 TFEU). [32]

58. Fourthly, in the course of the legislative procedure, the European Parliament Committee on Civil Liberties, Justice and Home Affairs even expressed the wish that the concept of indirect discrimination should also include the taxation of persons. [33] However, the proposed amendment to that effect was not adopted either by the committee responsible, the Committee on Employment and Social Affairs, [34] or the plenary of the European Parliament [35] in their respective positions on the proposal for a directive.

32 — See the comments on the legal basis (in point 4) and the explanations concerning Article 3 in the proposal (cited in footnote 29).

33 — Report of the Committee on Employment and Social Affairs of 21 September 2000 on the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation (A5-0264/2000), p. 63.

34 — Ibid., p. 1 et seq.

35 — See the European Parliament legislative resolution of 5 October 2010 on the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation (OJ 2010 C 178, p. 270).

f) Conclusion

59. Consequently, Directive 2000/78 does not apply to the taxation of pension income in the present case.

B – *Scope of the Charter*

60. Although Directive 2000/78 is therefore irrelevant in the dispute in the main proceedings, the question nonetheless arises as to whether the prohibition of discrimination contained in Article 21(1) of the Charter is directly applicable. The Member States are, after all, bound by that prohibition even in matters falling outside the scope of Directive 2000/78, in so far as the Charter is applicable in accordance with Article 51 thereof.

61. In accordance with the first sentence of Article 51(1) of the Charter, the Republic of Finland is required to observe the EU-law prohibition of discrimination on the ground of age whenever it is 'implementing Union law'. It is the Court's settled case-law that that form of words means that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations *governed* by EU law, but not outside such situations. [36]

62. According to the judgment in *Pfleger*, situations governed by EU law also include those in which national legislation is such as to restrict the fundamental freedoms guaranteed by the Treaty. A Member State can justify such a restriction only if, at the same time, it observes the fundamental rights provided for in the Charter. [37]

63. In the present case, the taxation of the taxpayer's retirement pension might constitute a restriction of a fundamental freedom and thus fall within the scope of the Charter. After all, the pension received by the taxpayer in 2013 derives at least in part from an activity which he previously carried on in a Member State other than the Republic of Finland. To that extent, the fact that that pension is taxed in Finland may constitute a restriction of the taxpayer's freedom of movement as a worker.

64. Article 45(1) TFEU secures freedom of movement for workers within the Union. In accordance with settled case-law, that provision precludes any measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of that fundamental freedom guaranteed by the Treaty. [38]

65. It is to be borne in mind in this regard, first, that, as a Finnish national, the taxpayer is not prevented from relying on the freedom of movement for workers as against his own State. Secondly, a retirement pension drawn on the basis of a previous employment relationship also benefits from the protection provided for in Article 45 TFEU. [39]

66. Although the taxation in Finland of a pension received by the taxpayer which he acquired at least in part on account of employment in Sweden is prejudicial to the exercise of his freedom of movement as a worker, there is nonetheless no restriction of that fundamental freedom as defined by previous case-law. This states that a national measure in the field of tax law is regarded as being liable to hinder or render less attractive the exercise of a fundamental freedom only where it distinguishes

36 — See, inter alia, the judgments in *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19); *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 33); and *Delvigne* (C-650/13, EU:C:2015:648, paragraph 26).

37 — See the judgment in *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 35 and 36).

38 — See the judgment in *Commission* v *Belgium* (C-317/14, EU:C:2015:63, paragraph 23 and the case-law cited).

39 — See the judgment in *Sehrer* (C-302/98, EU:C:2000:322, paragraphs 29 and 30).

between domestic and cross-border activity. On the other hand, the levying of a direct tax, without distinction, in domestic and cross-border situations — as in the present case of a uniform rate of tax applicable to all income derived from a retirement pension — cannot restrict the fundamental freedoms.[40]

67. Consequently, in so far as it levies income tax on income from a retirement pension, the Republic of Finland is not implementing EU law in the present case. By extension, therefore, the prohibition of discrimination on the ground of age laid down in Article 21(1) of the Charter is not directly applicable in the dispute in the main proceedings, in accordance with the first sentence of Article 51(1) of the Charter.

VI – **Conclusion**

68. In the light of all the foregoing, the answer to the questions referred by the Korkein hallinto-oikeus (Supreme Administrative Court) should be as follows:

National legislation such as Paragraph 124(1) and (4) of the Finnish Law on income tax, which provides for a supplementary tax on pension income, is not to be assessed by reference to the EU-law prohibition of discrimination on the ground of age as laid down in Article 21(1) of the Charter of Fundamental Rights of the European Union and in Directive 2000/78/EC.

40 — See my Opinions in *X* (C-498/10, EU:C:2011:870, point 28); *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, points 83 and 84); and *X* (C-686/13, EU:C:2015:31, point 40); taxes having a prohibitive effect may be an exception — see the judgment in *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 40 and 41) and my Opinion in *Viacom Outdoor* (C-134/03, EU:C:2004:676, point 63).