Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

26 May 2016*

(Reference for a preliminary ruling — Articles 21 and 45 TFEU — Freedom of movement and of residence of persons and workers — Income tax — Retirement pension — Pensioners' tax credit — Conditions for granting — Possession of a tax deduction form issued by national authorities)

In Case C-300/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal administratif (Administrative Court, Luxembourg), made by decision of 16 June 2015, received at the Court on 19 June 2015, in the proceedings

Charles Kohll,

Sylvie Kohll-Schlesser

v

Directeur de l'administration des contributions directes,

THE COURT (Tenth Chamber),

composed of F. Biltgen, President of the Chamber, A. Borg Barthet and E. Levits (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— the Luxembourg Government, by D. Holderer, acting as Agent,

— the European Commission, by W. Roels and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

* Language of the case: French.

2 The request has been made in proceedings between Mr Charles Kohll and Mrs Sylvie Kohll-Schlesser, pensioners resident in Luxembourg, and the Directeur de l'administration des contributions directes (Director of the Direct Taxation Authorities), concerning the refusal of the latter to grant a tax credit to Mr Kohll in respect of the tax years 2009 to 2011.

Legal context

Luxembourg law

3 Article 96(1) of the loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu (amended Law of 4 December 1967 on income tax) (*Mémorial* A 1967, p. 1228; 'the LIT'), in the version in force at the time of the events in the main proceedings, states:

'The following shall be considered to be income arising from pensions or annuities:

1. Retirement pensions and survivors' pensions received in consideration of past employment and other allowances and benefits, even if irregular or voluntary, received in consideration thereof;

2. Annuity payments, pensions or other periodical allowances and supplementary benefits paid from an independent retirement fund supplied, in whole or in part, by the contributions of insured persons, as well as child-rearing allowance and annuities covered by Article 96a;

…'

4 According to Article 139*ter* of the LIT, which was inserted by Article 1(24) of the Law of 19 December 2008 (*Mémorial* A 2008, p. 2622):

'(1) Any taxpayer in receipt of income arising from pensions or annuities within the meaning of Article 96(1)(1) and (2) of the LIT which Luxembourg has the right to tax, and in possession of a tax deduction form, is to be granted a pensioners' tax credit (PTC). The tax credit shall be taken into account only once for all pensions and annuities awarded to the taxpayer.

(2) Pensioners' tax credit shall be fixed at EUR 300 per year. The monthly amount shall be EUR 25. Pensioners' tax credit shall be limited to the period in which the taxpayer is entitled to an income arising from pensions or annuities within the meaning of and subject to the conditions set out in [paragraph 1]. It shall be paid by the pension fund or any other body liable for payment of the pension during the tax year to which it relates, as provided for in detailed rules to be set out in the Grand-Ducal regulation referred to in [paragraph] 4. For incomes amounting to less than EUR 300 per year or EUR 25 per month, the pensioners' tax credit shall not be granted. The pensioners' tax credit shall be imputable and refundable to the pensioner exclusively in the context of the deduction of tax from wages and salaries as duly carried out by the pension fund or any other body liable for payment of the pension, on the basis of a tax deduction form.

(3) The pension fund or body liable for payment of the pension having paid the pensioners' tax credit and single-parent tax credit is entitled to offset credits granted against positive deductions or, where applicable, claim reimbursement of the tax credits advanced, as provided for in detailed rules to be set out in the Grand-Ducal regulation referred to in [paragraph] 4.

(4) A Grand-Ducal regulation may specify the detailed rules for the application of the present Article.'

5 Under Article 143(1) of the LIT:

‘There shall be established for each employee, subject to the exceptions provided for by Grand-Ducal regulation, a tax deduction form containing the information necessary for the application of the deduction tariff and to be endorsed

(a) by the Administration des Contributions Directes, with the particular requirements to be observed when determining the deduction;

(b) by the employer, with the amount of compensation due, the deductions made, and the tax credits granted.

…’

6 Article 144 of the LIT provides:

‘The provisions of Articles 136 to 143 shall apply by analogy to pensions and annuity payments mentioned in Article 96(1)(1) and (2). Adaptation measures shall be fixed by Grand-Ducal regulation.’

7 Under Article 1(1) of the règlement grand-ducal du 19 décembre 2008 réglant les modalités d’application de l’octroi du crédit d’impôt pour pensionnés (Grand-Ducal Regulation of 19 December 2008 governing the detailed rules for granting the pensioners’ tax credit) (*Mémorial* A 2008, p. 2645):

‘The Pensioners’ Tax Credit (PTC) shall be granted by the pension fund or any other body liable for payment of the pension to those pensioners who possess a deduction form on which the inscription PTC is found. If a tax credit is not noted on the deduction form, or if the pensioner does not possess a deduction form, the pension fund or any other body liable for payment of the pension is not entitled to grant a tax credit.

…’

The Convention between the Grand Duchy of Luxembourg and the Kingdom of the Netherlands for the avoidance of double taxation

8 The Convention between the Grand Duchy of Luxembourg and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and wealth, signed at The Hague on 8 May 1968, in the version in force at the time of the events in the main proceedings (‘the double taxation convention’) provides at Article 19 that, subject to the provisions of Article 20(1) of that convention, pensions and other similar remuneration paid to a resident of one of the States in consideration of past employment is to be taxable only in that State.

9 Under Article 20(1) of that convention, remuneration, including pensions, paid by or out of funds created by one of the States party to the Convention, its political subdivisions, local authorities or other public entities thereof, to a person resident in one of the States, in respect of services rendered to that State, a political subdivision, a local authority or other public entity thereof in the discharge of functions of a governmental nature, may be taxed in that State.

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

10 Mr Kohll and his wife, Mrs Kohll-Schlesser, both of Luxembourg nationality, are resident in Luxembourg. Mr Kohll receives two pensions from the Netherlands, coming from Shell International BV and the Sociale Verzekeringsbank (Social Insurance Fund), respectively. Mrs Kohll-Schlesser also receives a pension from the Sociale Verzekeringsbank (Social Insurance Fund).

11 On 20 February 2013 Mr Kohll submitted a complaint against the income tax notices published for 2009 to 2011 on the grounds that the Luxembourg tax authorities had not granted him the pensioners' tax credit as provided for under Article 139*ter* of the LIT ('the tax credit').

12 By decision of 23 September 2013 the Directeur de l'administration des contributions directes (Director of the Direct Taxation Authorities) rejected Mr Kohll's complaint, first, in so far as it related to income received during 2009, as being lodged too late and, therefore, inadmissible, and, second, in so far as it related to income received during 2010 and 2011, confirming that Mr Kohll was not eligible for the tax credit and imposing tax adjustments on him for income received during those years.

13 On 10 December 2013 Mr Kohll and Mrs Kohll-Schlesser brought an action before the referring court, the tribunal administratif (Administrative Court, Luxembourg), seeking annulment of that decision of the Directeur de l'administration des contributions directes (Director of the Direct Taxation Authorities).

14 The tribunal administratif (Administrative Court) takes the view that the action brought by Mrs Kohll-Schlesser, who did not lodge a prior complaint with the Directeur de l'administration des contributions directes (Director of the Direct Taxation Authorities) in her own name, is inadmissible, but considers that Mr Kohll's action is admissible. That action challenged, in particular, the compatibility of Article 139*ter* of the LIT with the principle of the free movement of workers provided for under Article 45 TFEU.

15 The referring court states that the tax credit is granted to all taxpayers in receipt of income arising from pensions or annuities within the meaning of Article 96(1)(1) and (2) of the LIT, subject to the condition that the right to tax the income lies with the Grand Duchy of Luxembourg and that the taxpayer is in possession of a tax deduction form.

16 According to the referring court, although the pensions at issue in the present case are taxable in Luxembourg, it is, on the other hand, undisputed that Mr Kohll has not been issued with a tax deduction form as regards the pensions on which he is claiming a right to a tax credit.

17 In that regard, the referring court states that Article 139*ter* of the LIT is therefore likely to lead to indirect discrimination in so far as that provision makes the grant of a tax credit subject to the condition that the potential beneficiary be in possession of a tax deduction form. That tax credit is not granted to persons receiving a salary or a pension not subject to deduction at source, such as pensions from abroad.

18 In those circumstances, the tribunal administratif (Administrative Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the principle of freedom of movement for workers, as enshrined in particular in Article 45 TFEU, preclude the provisions of Article 139*ter*(1) of the LIT in so far as they restrict eligibility for the tax credit established there to persons in possession of a tax deduction form?'

The question referred for a preliminary ruling

19 By its question the referring court asks in essence whether Article 45 TFEU must be interpreted as precluding a national tax law such as that at issue in the main proceedings, which restricts the eligibility for the pensioners' tax credit to taxpayers in possession of a tax deduction form.

The freedom at issue

20 It is appropriate, as a preliminary point, to examine whether Article 45 TFEU, an interpretation of which is sought by the referring court, can be relied upon in a situation such as that at issue in the main proceedings which relates to the tax treatment, by a Member State, of retirement pensions paid to a resident of that Member State by a body liable for payment established in another Member State.

21 The Luxembourg Government raises doubts as to the applicability of that provision in the dispute in the main proceedings and the European Commission takes the view that that provision would be applicable only if Mr Kohll had become resident in Luxembourg prior to his retirement in order to seek or take up employment in that Member State. Article 45 TFEU would not in fact apply to Mr Kohll's situation if he had taken up residence in Luxembourg once he had already retired and without the intention of taking up professional activity there.

22 In that regard, it should be borne in mind that any national of the European Union who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement of workers and who has been employed in a Member State other than that of his residence comes within the scope of Article 45 TFEU (judgment of 28 February 2013 in *Petersen*, C-544/11, EU:C:2013:124, paragraph 34 and the case-law cited).

23 As regards, first, the pension paid to Mr Kohll by Shell International, it is not disputed that that pension was received in consideration of past employment that the applicant undertook in a Member State, in this case the Netherlands, other than that of which he is a national and in which he resides at the time of the facts in the main proceedings.

24 Having undertaken employment in another Member State, Mr Kohll has exercised the right to freedom of movement provided for under Article 45 TFEU.

25 The Court has held that the fact that a person is no longer in an employment relationship does not deny him certain guaranteed rights which are linked to the status of a worker and that a retirement pension, whose grant is dependent on the prior existence of an employment relationship which has come to an end, falls within that category of rights. The pension entitlement is intrinsically linked to the objective status of a worker (see, to that effect, judgment of 15 June 2000 in *Sehrer*, C-302/98, EU:C:2000:32, paragraph 30 and the case-law cited).

26 The situation of a taxpayer such as Mr Kohll, receiving a pension paid in consideration of employment carried out in a Member State other than that of which he is a national and in which he resides at the time of the facts in the main proceedings, is different from that of a person who has spent his entire working life in a Member State of which he is a national and who has only exercised the right to reside in another Member State after having retired, and who cannot therefore rely on the free movement guaranteed by Article 45 TFEU (see, to that effect, judgment of 9 November 2006 in *Turpeinen*, C-520/04, EU:C:2006:703, paragraph 16).

27 That consideration is moreover not contradicted by the judgment of the Court of 19 November 2015 (in *Hirvonen*, C-632/13, EU:C:2015:765), in which it found, in paragraph 21, that retired persons who leave the Member State in which they spent their entire working life to reside in another Member

State may benefit, where their situation is not covered by the freedom of movement guaranteed by Article 45 TFEU, from the right to freedom of movement as a citizen of the European Union provided for under Article 21 TFEU.

28 Consequently, a citizen and resident of a Member State, such as Mr Kohll, can take advantage of Article 45 TFEU as regards a retirement pension paid in consideration of his past employment in a Member State which is neither that of which he is a national nor that where he resides at the time of the facts in the main proceedings, irrespective of whether, after having worked in that other Member State, he has settled in his Member State of origin in order to seek or take up employment there.

29 As regards, second, the pension paid to Mr Kohll by the social insurance fund, it is clear from the file submitted to the Court that the parties in the main proceedings disagree as to the legal basis on which that pension is granted to the applicant and as to the right of the Grand Duchy of Luxembourg to tax it, taking into account Article 20(1) of the double taxation convention.

30 The referring court, while specifying that that pension is granted to any person who has lived in the Netherlands irrespective of whether that person undertook employment there, nonetheless takes the view that it falls under Article 19 of the double taxation convention, even though that provision covers pensions paid in consideration of employment.

31 It is for the referring court to establish the legal basis on which that pension is paid to Mr Kohll by the social insurance fund and, in particular, to determine whether that pension, even though it is *a priori* granted to all persons resident in the Netherlands, was nevertheless granted in the present case to Mr Kohll by reason of his employment in the Netherlands, and whether the amount of that pension depends on his status as an employed person. If that question is answered in the affirmative, Article 45 TFEU could be relied upon in the dispute in the main proceedings for the reasons set out at paragraphs 23 to 28 above.

32 On the other hand, if it were to be found that neither the obligation placed upon the social insurance fund to pay Mr Kohll a pension, nor the amount of that pension, depend on the applicant's status as a worker, but rather on the fact that he was resident in the Netherlands, Article 21 TFEU, which, generally speaking, provides for the right for every citizen of the Union to move and reside freely within the territory of the Member States, could be relied upon.

33 Consequently, as both Article 21 TFEU and Article 45 TFEU fall to be applied in the case in the main proceedings, it is necessary to interpret those two provisions.

34 In that regard, the fact that, in the question referred for a preliminary ruling, the referring court referred only to Article 45 TFEU does not preclude the Court from also interpreting Article 21 TFEU.

35 According to the settled case-law of the Court, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of EU law to which the national court did not refer in its questions (judgment of 28 February 2013 in *Petersen*, C-544/11, EU:C:2013:124, paragraph 24 and the case-law cited).

The existence of a restriction

36 As regards, first, Article 45 TFEU, it should be borne in mind that even if, according to their wording, the rules on freedom of movement for workers are intended, in particular, to secure the benefit of national treatment in the host State, they also preclude the State of origin from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State (judgment of 28 February 2013 in *Petersen*, C-544/11, EU:C:2013:124, paragraph 36 and the case-law cited).

37 In the present case, according to the national law, the tax credit is granted to taxpayers in receipt of income arising from a retirement pension, taxable in Luxembourg, amounting to at least EUR 300 per year or EUR 25 per month, and who are in possession of a tax deduction form.

38 However, as the referring court made clear, the beneficiary of a retirement pension will not be issued with a tax deduction form where that pension, even if it is taxable in Luxembourg, is not subject to deduction of tax at source in that Member State by reason of the fact, inter alia, that the body liable to pay the pension is established in another Member State.

39 It follows that the tax advantage that the tax credit constitutes is not granted to taxpayers who are resident in Luxembourg and whose pensions, though taxable in that Member State, originate in another Member State.

40 By introducing a difference in treatment between taxpayers resident in Luxembourg, depending on the Member State from which the retirement pensions, taxable in Luxembourg, which they receive originate, and by refusing the benefit of the tax credit to taxpayers for whom the body liable for payment of the pension is established in the territory of another Member State, the national legislation at issue in the main proceedings is likely to deter workers from seeking or undertaking employment in a Member State other than the Grand Duchy of Luxembourg.

41 Such legislation therefore entails a restriction on the free movement of workers which is prohibited, in principle, by Article 45 TFEU.

42 As regards, second, Article 21 TFEU, it is apparent from the settled case-law of the Court that a national law which places certain nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the European Union (judgment of 26 February 2015 in *Martens*, C-359/13, EU:C:2015:118, paragraph 25 and the case-law cited).

43 Indeed, the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State could be dissuaded from using them by obstacles resulting from his stay in another Member State because of legislation of his State of origin penalising the mere fact that he has used those opportunities (judgment of 26 February 2015 in *Martens*, C-359/13, EU:C:2015:118, paragraph 26 and the case-law cited).

44 In the present case, in so far as the tax advantage which the tax credit constitutes is refused to Luxembourg taxpayers who have exercised their freedom to move and to reside in a Member State other than that of which they are a national and who receive, due to their residence in that other Member State, a pension paid by a body liable for payment established in that Member State, that Luxembourg taxpayer finds himself at a disadvantage in comparison with taxpayers who have not exercised their freedom to move and to reside in another Member State. The law at issue in the main proceedings, which introduces such a difference in treatment, is likely to deter a taxpayer from exercising that freedom and thus constitutes a restriction on the freedoms recognised by Article 21 TFEU.

The existence of a justification

45 Such restrictions are permissible only if they relate to situations which are not objectively comparable or if they are justified by an overriding reason in the public interest (see, inter alia, judgment of 17 December 2015 in *Timac Agro Deutschland*, EU:C:2015:829, C-388/14, paragraph 26).

46 As regards whether the situations at issue are objectively comparable, it must be recalled that the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue (see, to that effect, judgments of 25 February 2010 in *X Holding*, C-337/08, EU:C:2010:89, paragraph 22, and 6 September 2012 in *Philips Electronics UK*, C-18/11, EU:C:2012:532, paragraph 17).

47 In that regard, the Luxembourg Government submits that the tax credit was introduced in order to pursue a selective tax policy in favour of persons belonging to more vulnerable sections of society, by enabling them to obtain, as a result of such a tax advantage, a higher level of disposable income.

48 However, given that objective, a resident taxpayer who receives a retirement pension having its source in another Member State does not necessarily find himself in a different situation from that of a resident taxpayer receiving such a pension from a body liable for payment established in his Member State of residence, as both those taxpayers might belong to more vulnerable sections of society.

49 The restriction can therefore be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (judgment of 17 December 2015 in *Timac Agro Deutschland*, C-388/14, EU:C:2015:829, paragraph 29 and the case-law cited).

50 In that regard, the Luxembourg Government submits that the tax credit system is justified by the need to preserve the cohesion of the national tax system, by providing for the grant of a tax credit which is imputable and refundable, in an effective, equitable and practical manner, in particular without leading to a disproportionate administrative burden.

51 First, according to the Luxembourg Government, the tax credit system is the only practical alternative that would not lead to excessive administrative burdens for the authorities, for the bodies liable to pay the incomes at issue, and for the individuals concerned. Only the national bodies responsible for the payment of pensions and payment of tax revenue to the Treasury (i) have at their disposal up-to-date information allowing for the effective, fair and appropriate grant of the tax credit and (ii) are also able directly and effectively to charge or reimburse the tax credit to the taxpayers concerned.

52 Second, that system is necessary in order to preserve the cohesion of the national tax system in its entirety and there is, in Luxembourg legislation, a link between the tax collection system, in the present case the deduction of tax on income from pensions within the meaning of Article 96(1)(1) and (2) of the LIT, and the tax credit.

53 As regards, in the first place, the administrative and practical considerations to which the Luxembourg Government makes reference, it must be borne in mind that the Court has in fact previously held that Member States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities (judgment of 24 February 2015 in *Sopora*, C-512/13, EU:C:2015:108, paragraph 33 and the case-law cited).

54 However, it is important to bear in mind that what is being disputed in the main proceedings is neither the system based on deduction at source nor the appropriate and practical nature of the issue of the tax deduction form, but rather the absolute refusal to grant a tax advantage where the taxpayer concerned is unable to produce such a document, even if he satisfies the other conditions required in order to be eligible for that advantage.

55 It cannot be excluded *a priori* that a taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the income arising from pensions in another Member State (see, by analogy, judgment of 27 January 2009 in *Persche*, C-318/07, EU:C:2009:33, paragraph 53).

56 Nothing would prevent the tax authorities concerned from requiring that taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for granting that advantage provided for in the legislation at issue have been met and, consequently, whether to allow the advantage sought (see, by analogy, judgment of 27 January 2009 in *Persche*, C-318/07, EU:C:2009:33, paragraph 54).

57 In that regard, the Luxembourg Government has provided no indications as to the reasons that would prevent it from basing the decision on information submitted by a taxpayer who seeks to benefit from the tax credit.

58 Furthermore, as noted by the Advocate General in point 68 of his Opinion, the Luxembourg Government, while relying on alleged administrative burdens and their disproportionate nature, remains vague as to their exact nature.

59 In any event, it should be noted that the Court has already held that practical difficulties cannot of themselves justify the infringement of a fundamental freedom guaranteed by the Treaty (judgment of 1 July 2010 in *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 60 and the case-law cited).

60 In the second place, although the need to maintain the cohesion of a tax system can justify a restriction on the exercise of fundamental freedoms guaranteed by the Treaty, in order for an argument based on such a justification to succeed, the Court requires that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the legislation at issue (see, to that effect, judgment of 1 July 2010 in *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraphs 54 and 55 and the case-law cited).

61 In the present case, the Luxembourg Government has not established the existence of a direct link between the tax credit and a particular tax levy, the pensions coming from another Member State, like pensions coming from Luxembourg, being taxable in Luxembourg, but based its arguments on the existence of a link between the tax credit and a technique of taxation, namely deduction at source, applied solely to pensions where the body liable for payment is established in Luxembourg. The tax advantage at issue in the main proceedings is not therefore offset by a particular levy, within the meaning of the case-law cited in the preceding paragraph.

62 Consequently, it must be held that the restrictions deriving from the application of the national tax legislation at issue in the main proceedings, in principle prohibited by Articles 21 and 45 TFEU, cannot be justified on the grounds advanced by the Luxembourg Government.

63 In light of the foregoing considerations, the answer to the question referred is that Articles 21 and 45 TFEU must be interpreted as precluding a national tax law, such as that at issue in the main proceedings, which restricts the eligibility for the pensioners' tax credit to taxpayers in possession of a tax deduction form.

Costs

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

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

Articles 21 and 45 TFEU must be interpreted as precluding a national tax law, such as that at issue in the main proceedings, which restricts the eligibility for the pensioners' tax credit to taxpayers in possession of a tax deduction form.

[Signatures]