*CFE ECJ Task Force**

Opinion Statement ECJ-TF 3/2015 on the Decision of the European Court of Justice in *C.G. Sopora* (Case C-512/13), on "Horizontal Discrimination"

This is an Opinion Statement prepared by the CFE ECJ Task Force on *C.G. Sopora* (Case C-512/13), which was decided by the Grand Chamber of the ECJ on 24 February 2015.

1. Issues and Preliminary Questions

On 24 February 2015, the Grand Chamber of the ECJ handed down its decision in *C.G. Sopora* (Case C-512/13)[1] concerning the question of whether or not a specific requirement to obtain a tax advantage for foreign (incoming) workers violates the freedom of movement of workers (article 45 of the Treaty on the Functioning of the European Union (TFEU) (2007)).[2] This case prominently raises the issue of a differentiation not between nationals and non-nationals (i.e. "vertical discrimination"), but rather between different non-nationals (i.e. "horizontal discrimination") in the context of the taxation of payments of deemed employment expenses ("extraterritorial costs"). By clearly accepting such a "horizontal comparison" in the context of article 45 of the TFEU, a question has been resolved in respect of which the Court "up to now" has "given varying signals".[3] The decision also suggests that the Court's answer to that question might have wider application.

The tax advantage at issue in *Sopora* relates to "extraterritorial costs". Under the Netherlands Wage Tax Act,[4] employers may reimburse, exempt from tax, certain "extraterritorial costs" of their incoming workers. Generally, this reimbursement relates to those costs actually incurred by incoming workers as a result of staying outside their countries of origin to work in the Netherlands (as such, no overcompensation in respect of these expenses is permitted). If, however, two conditions are fulfilled, the tax-free payment in respect of "extraterritorial costs" may (for the incoming worker's benefit)[5] be deemed as 30% of the wage tax base ("the flat-rate rule"), irrespective of the costs actually incurred (and even where the amount of those expenses is nil). This flat-rate rule is provided for in the 1965 Implementing Decision concerning Wages Tax (as amended in 2010) and administrative ease was stated to be the reason for setting this flat-rate rule. Otherwise, the costs are always required to be specified. The conditions for the application of this tax advantage are that:

- the incoming worker has specific expertise that is rare on the Netherlands labour market; and
- he resides more than 150 kilometres from the Netherlands border for two thirds of the two-year period before commencing employment in the Netherlands.

The latter condition hence leads to a territorial exclusion of certain foreigners: only workers from Belgium, France, Germany, Luxembourg and the United Kingdom can fail the second condition, whereas workers from other Member States will always satisfy it.[6]

In this case, Mr Sopora worked for a Netherlands employer in the Netherlands from 1 February 2012 to 31 December 2012. For the two years immediately prior to taking up his employment in the Netherlands, his place of residence was in Germany, though at a distance of less than 150 kilometres from the Netherlands border. Since he did not meet the 150-kilometre condition, he did not qualify for the 30% flat-rate rule. The Netherlands Supreme Court (*Hoge Raad der Nederlanden*) referred preliminary questions to the ECJ on the validity of the 150-kilometre requirement under the free movement of workers:

> 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

* **The members of the Task Force include: Alfredo Garcia Prats, Daniel Gutmann, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, Franck Le Mentec, João Félix Pinto Nogueira, Pasquale Pistone, Albert Rädler†, Stella Raventos-Calvo, Isabelle Richelle, Friedrich Roedler and Kelly Stricklin-Coutinho. Although the Opinion Statement was drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. The Task Force wishes to thank Rupert Shiers for his valuable input.**

1. NL: ECJ, 24 Feb. 2015, Case C-512/13, *C.G.Sopora*, ECJ Case Law IBFD.
2. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
3. *See* for that starting point, NL: Opinion of Advocate General Kokott, 13 Nov. 2014, Case C-512/13, *C. G. Sopora*, para. 24, ECJ Case Law IBFD.
4. NL: Wage Tax Act 1964, National Legislation IBFD.
5. The flat-rate rule never operates to the disadvantage of those workers: if the extraterritorial expenses that were actually incurred exceed the flat-rate ceiling of 30%, it is possible, even where the conditions laid down for applying the flat-rate rule are met, for those workers to obtain an exemption for the reimbursement of extraterritorial expenses on production of appropriate proof. *See C.G. Sopora* (C-512/13), paras. 6 and 28.
6. *See* AG Opinion in *C.G. Sopora* (C-512/13), para. 19; *C.G. Sopora* (C-512/13), para. 31.

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?

2. The Decision of the Court

In its decision of 24 February 2015, the Court (Grand Chamber) combined the questions and held that the 150 kilometre condition for the 30% flat-rate rule to apply does not violate article 45 of the TFEU unless those limits were set in such a way that that exemption systematically gives rise to clear overcompensation in respect of the extraterritorial expenses actually incurred (which is a matter for the domestic court to ascertain). In so holding, the Court effectively endorsed Advocate General Kokott's approach with regard to the core issue of "horizontal discrimination",[7] but took a different route on justification: while the Court emphasized the legitimate objective of the Netherlands rule (i.e. to take into account additional expenses and hence facilitate the free movement of workers) and administrative considerations, Kokott had focused on the prevention of competitive disadvantage for national workers and of distortions of competition among non-resident workers and employed a multi-facetted analysis with regard to appropriateness and proportionality.[8]

On the issue of "horizontal discrimination", the Court surprisingly did not discuss precedents. It merely recited its traditional case law on vertical (covert) discrimination of non-residents in, for example, *Sotgiu* (Case 152/73)[9] and *Schumacker* (Case C-279/93),[10] according to which the freedom of movement of workers "prohibits a Member State from adopting a measure which favours workers residing in its territory if that measure ultimately favours that Member State's own nationals, thereby giving rise to discrimination based on nationality".[11] The Court then quickly moved to the core of the case, stating that:[12]

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

To determine whether this was a situation of "nationals of certain Member States being unduly favoured in comparison with others", the Court took into account the objective pursued by the legislation. In that respect, the Court obviously accepted:

- that the Netherlands measure facilitates "the free movement of workers residing in other Member States who have accepted employment in the Netherlands and who are, by virtue of that fact, liable to incur additional expenses, by making the benefit of the flat-rate rule available to those workers and not to workers who have been resident for a long time in the Netherlands";[13] and
- that the 150-kilometre requirement and the 30% flat-rate rule are based on the consideration that, for qualifying workers, "it is no longer possible for those workers to make the return journey on a daily basis, with the result that in principle they are compelled to find accommodation also in the Netherlands", and "that the resulting additional living expenses are significant".[14]

Appreciating that the flat-rate rule never works to the disadvantage of the affected incoming workers[15] and allows for overcompensation,[16] the Court's decision, however, does not reflect the detailed and nuanced analysis of Advocate General Kokott on whether or not the 150-kilometre criterion is capable of reflecting, in essence, the extent of a worker's extraterritorial expenses.[17] The Court rather noted that it is "an inherent aspect of the granting, on a flat-rate basis, of a tax advantage which is deemed to cover situations in which the material conditions governing entitlement to that advantage have been satisfied beyond doubt" that there will also be other situations in which those conditions are satisfied (but the benefit is only granted on the production of appropriate proof).[18] It then confirmed "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".[19] Hence, as long as the flat-rate rule does

7. AG Opinion in *C.G. Sopora* (C-512/13), paras. 14-34.
8. Id., paras. 35-62.
9. DE: ECJ, 12 Feb. 1974, Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, para. 11.
10. DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, para. 24, ECJ Case Law IBFD.
11. *C.G. Sopora* (C-512/13), para. 24.
12. Id., at para. 25.
13. Id., at para. 26.
14. Id., at para. 27.
15. Id., at paras. 6 and 28.
16. Id., at para. 29.
17. *See* AG Opinion in *C.G. Sopora* (C-512/13), paras. 51-62, noting, inter alia, that the 150-kilometre requirement is measured from the border and hence has limited meaningfulness in relation to the actual distance from the worker's place of residence to his place of work.
18. *C.G. Sopora* (C-512/13), paras. 32.
19. Id., at para. 33, referring to IT: ECJ, 10 Feb. 2009, Case C-110/05, *Commission v. Italy*, para. 67; NL: ECJ, 16 Feb. 2010, Case C-137/09, *Josemans*, para. 82 and ES: ECJ, 24 Mar. 2011, Case C-400/08, *Commission v. Spain*, para. 124.

not systematically give rise to "net" (i.e. clear)[20] overcompensation, the Court will accept such a measure:[21]

> The mere fact that limits are set concerning the distance in relation to the workers' place of residence and concerning the ceiling of the exemption granted, taking as the starting point the Netherlands border and the taxable base, respectively, even though, as the referring court states, this is necessarily approximate in nature, cannot therefore, in itself, amount to indirect discrimination or an impediment to the free movement of workers. This is a fortiori so where, as in the present case, the flat-rate rule operates in favour of the workers who benefit from it, in that it reduces significantly the administrative steps which those workers must undertake in order to obtain the exemption for the reimbursement of extraterritorial expenses. […] The position would, however, be different if — and this is a matter for the referring court to ascertain — those limits were set in such a way that the flat-rate rule were systematically to give rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

Hence, the ECJ (Grand Chamber) ruled as follows:

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

3. Comments

The *Sopora* decision is certainly a landmark decision on horizontal comparison since the Court so far had given varying signals as to whether "horizontal discrimination" between two different cross-border activities is even addressed by the fundamental freedoms: for benefits granted in a tax treaty, the Court in *D* (Case C-376/03)[22] and *ACT Group Litigation* (Case C-374/04)[23] examined "whether the differing treatment of various non-residents constitutes an impairment of the fundamental freedom in the specific case in question",[24] but likewise emphasized that different non-residents covered by different tax treaties are not in the same situation and that hence no "horizontal discrimination" by the source state can arise, at least if the tax treaty benefit in question is not "separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance".[25] When it comes to purely domestic measures differentiating between two non-residents based on their respective Member States of residence, the picture is not clear: Advocates General Léger,[26] Mengozzi,[27] Bot[28] and Kokott,[29] as well as the Commission[30] have argued that the various freedoms prohibit not only adverse unequal treatment of non-residents vis-à-vis residents, but also differentiation between non-residents of different Member States. The Court's case law has, however, been ambiguous: Even leaving aside the ongoing discussion about the free choice of secondary establishment, i.e. the horizontal comparison between branches and subsidiaries, in an "inbound" (*CLT-UFA* (Case C-253/03))[31] and "outbound" (for example, *Marks & Spencer* (Case C-446/03),[32] *X Holding* (Case C-337/08))[33] perspective, the Court's case law was lacking clarity. While

20. The concept of "net overcompensation" in paragraph 36 of the English-language version of the decision might be unclear. From a multilingual interpretation, however, useful elements arise. In some languages, for example, German (*deutlichen Überkompensierung*), French (*nette surcompensation*), Dutch (*duidelijke overcompensatie*) and Italian (*netta sovracompensazione*) the expression used means at the same time "clear" ("evident") and "significant". In contrast. the terms used in Spanish (*evidente*) and Portuguese (*clara compensação*) are univocal in the sense of "clear" ("evident"). It therefore seems that overcompensation is acceptable if it is limited to incidental and minor distortions of competition between various categories of workers of other Member States, because such overcompensation may be inherent to fixed sums, i.e. this may be "an inherent aspect of the granting, on a flat-rate basis, of a tax advantage" (*see C.G. Sopora* (C-512/13), para. 31).
21. *C.G. Sopora* (C-512/13), paras. 34 and 35.
22. NL: ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paras. 53-63, ECJ Case Law IBFD.
23. UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*, paras. 82-93, ECJ Case Law IBFD.
24. *See* AG Opinion in *C.G. Sopora* (C-512/13), para. 26.
25. *D* (C-376/03), para. 62; *see also ACT Group Litigation* (C-374/04), para. 88; NL: ECJ, 20 May 2008, Case C-194/06 *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV,* para. 51, ECJ Case Law IBFD.
26. UK: Opinion of Advocate General Léger, 2 May 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue,* paras. 77-78, ECJ Case Law IBFD (noting that even if the UK CFC legislation, which relied, inter alia, on the level of taxation in the subsidiary's state, "were tax-neutral compared to a purely domestic situation […] that would not call into question the existence of unequal treatment and the disadvantage to Cadbury in comparison with the position of a resident company which has established a subsidiary in another Member State which has a less favourable tax regime than that in effect in the International Financial Services Centre").
27. DE: Opinion of Advocate General Mengozzi, 29 May 2007, Case C-298/05, *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt*, paras. 71 et seq. and 109 et seq., ECJ Case Law IBFD (raising the question "as to whether a difference in treatment, provided for by the national legislation of the taxpayer's Member State of residence, which applies solely between two cross-border situations, is sufficient in order to consider that a restriction on freedom of establishment exists" and noting that "this question should be answered in the affirmative").
28. NL: Opinion of Advocate General Bot, 3 July 2007, Case C-194/06, *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV* paras. 100 et seq., ECJ Case Law IBFD (arguing that the freedoms of movement also address measures "which provide for a regime that differentiates between Member States and which treat investments in one Member State less favourably than those in another Member State").
29. AG Opinion in *C.G. Sopora* (C-512/13), paras. 27-29.
30. *See* the Eur. Commn. Press Release IP/07/445, *Direct Taxation: Commission requests Ireland to end discriminatory taxation of income sourced in the United Kingdom and asks the United Kingdom for information about similar rules applied in its territory* (30 Mar. 2007), concerning Irish legislation that excludes from the principle of remittance base taxation income sourced in the United Kingdom and thus treats such income less favourably than income arising elsewhere in the European Union. The proceedings against Ireland were closed on 27 November 2008.
31. DE: ECJ, 23 Feb. 2006, Case C-253/03, *CLT-UFA SA v. Finanzamt Köln-West*, para. 31 et seq., ECJ Case Law IBFD (comparing domestic subsidiaries with a foreign parent company, on the one hand, and with domestic branches with a foreign head office, on the other).
32. UK: ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, ECJ Case Law IBFD (not taking into account that losses of foreign PEs were generally included in the UK tax base, while losses suffered by its foreign subsidiaries were excluded); for a detailed discussion of such "horizontal" comparison, *see* UK: Opinion of Advocate General Poiares Maduro, 7 Apr. 2005, Case C-446/03, *Marks & Spencer*, paras. 42 et seq., ECJ Case Law IBFD.
33. NL: ECJ, 25 Feb. 2010, Case C-337/08, *X Holding BV v. Staatssecretaris van Financiën*, para. 40, ECJ Case Law IBFD (finding that, "[a]s permanent establishments situated in another Member State and non-resident subsidiaries are not […] in a comparable situation with regard to the allocation of the power of taxation, the Member State of origin is not obliged to apply the same tax scheme to non-resident subsidiaries as that which it applies to foreign permanent establishments").

Cadbury Schweppes (Case C-196/04),[34] *Orange European Smallcap Fund* (Case C-194/06)[35] and *Commission v. Netherlands* (Case C-521/07)[36] suggest that "horizontal discrimination" is to be scrutinized under the freedoms, *Columbus Container Services* (Case C-298/05)[37] and *Haribo and Salinen* (Joined Cases C-436/08 and C-437/08)[38] seem to have rejected the view that unequal treatment based on the country of establishment or origin falls under the relevant freedom's protection.

The Grand Chamber's decision in *Sopora*[39] finally brings about at least partial resolution in this area. The Court endorsed the Opinion of Advocate General Kokott[40] and found that, at least in the area of free movement of workers (article 45 of the TFEU), "horizontal comparisons" are possible and that differentiations by domestic law between comparable situations need to be justified to withstand scrutiny under EU law. The Court based its reasoning mainly on the wording of article 45(2) of the TFEU ("abolition of any discrimination based on nationality between workers of the Member States"), which necessitates the view that this freedom "also prohibits discrimination between non-resident workers if such discrimination leads to nationals of certain Member States being unduly favoured in comparison with others".[41] The other freedoms, however, lack similarly clear language, and hence the question arises whether a "horizontal comparison" is also possible under articles 49, 56 and 63 of the TFEU, particularly as the freedom of establishment and the freedom to provide services are granted "under the conditions laid down for its own nationals" and "under the same conditions as are imposed by that State on its own nationals", respectively, and therefore seem to focus on "vertical" comparisons. The Court's decision in *Sopora* does not give clarity on this issue. Given the convergence of the freedoms in the Court's case law, however, there are multiple arguments in favour of extending *Sopora* to all freedoms:

- First, the Court, without hesitation, has already referred to "horizontal comparisons" in the sphere of various other freedoms in, for example, *Cadbury Schweppes*,[42] *Orange European Smallcap Fund*[43] and *Commission v. Netherlands*.[44]
- Second, all freedoms prohibit "restrictions", a concept which can be understood broadly to also encompass "horizontal discrimination".[45]
- Third, the Court also based its decision on article 26 of the TFEU, paragraph 2 of which provides that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties", i.e. all freedoms appear to contribute in the same way to the internal market. In the context of the freedom of establishment and the free movement of capital, this internal market approach to the issue of horizontal discrimination has also been emphasized by several Advocates General, saying that it would "manifestly lead to a result contrary to the very notion of 'single market'"[46] and would create a "risk of fragmentation of the common market"[47] if a difference in the treatment depending on the Member State were to be allowed,[48] also pointing out that a prohibition against "horizontal discrimination" would be "consistent with the existence of an internal market".[49] Moreover, as Advocate General Kokott pointed out, the objective of article 26(2) of the TFEU in relation to the free movement of workers "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".[50] These arguments are, of course, also true for the economic activities covered by the other freedoms.

34. UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 45, ECJ Case Law IBFD (noting, for the purpose of determining a difference in treatment, that the UK CFC rules do not apply "for a resident company with a subsidiary taxed in the United Kingdom or a subsidiary established outside that Member State which is not subject to a lower level of taxation").
35. *Orange European Smallcap Fund* (C-194/06), para. 56 (finding a restriction of the free movement of capital under article 63 of the TFEU if the concessions relating to foreign source taxation for dividends originating in certain Member States are excluded, as such legislation "makes investment in those Member States less appealing than investment in the Member States in which the taxation at source of those dividends gives rise to that concession").
36. NL: ECJ, 11 June 2009, Case C-521/07, *Commission of the European Communities v. Kingdom of the Netherlands*, ECJ Case Law IBFD (holding that "[b]y not exempting dividends paid by Netherlands companies to companies established in Iceland or Norway from deduction at source of the tax on dividends under the same conditions as dividends paid to Netherlands companies or companies of other Member States of the Community, the Kingdom of the Netherlands has failed to fulfil its obligations under [Art. 40 EEA]").
37. DE: ECJ, 6 Dec. 2007, Case C-298/05, *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt*, paras. 50 and 51, ECJ Case Law IBFD (rejecting the view that unequal treatment depending on the Member State of establishment alone constitutes an impairment of the freedom of establishment under article 49 of the TFEU).
38. AT: ECJ, 10 Feb. 2011, Joined Cases C-436/08 and C-437/08, *Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v. Finanzamt Linz*, para. 48, ECJ Case Law IBFD (holding, in the context of free movement of capital under article 63 of the TFEU, that "the different treatment of income from one non-member State compared to income from another non-member State is not concerned, as such, by that provision").
39. *C.G. Sopora* (C-512/13).
40. AG Opinion in *C.G. Sopora* (C-512/13).
41. *C.G. Sopora* (C-512/13), para. 25; *see also* AG Opinion in *C.G. Sopora* (C-512/13), para. 23.
42. *Cadbury Schweppes* (C-196/04), para. 45.
43. *Orange European Smallcap Fund* (C-194/06), para. 56.
44. *Commission v. Netherlands* (C-521/07).
45. AG Opinion in *Columbus Container Services* (Case C-298/05), para. 109 et seq.
46. AG Opinion in *Cadbury Schweppes* (C-196/04), para. 80.
47. AG Opinion in *Columbus Container Services* (Case C-298/05), para. 117.
48. Concurring AG Opinion in *C.G. Sopora* (C-512/13), para. 28.
49. AG Opinion in *Columbus Container Services* (Case C-298/05), para. 118.
50. AG Opinion in *C.G. Sopora* (C-512/13), para. 29.

– Fourth and finally, article 18 of the TFEU prohibits "any discrimination on grounds of nationality" and is – as Advocate General Colomerhas pointed out[51] – certainly broad enough to outlaw discrimination between different non-resident nationals. Since this rule is, in itself, a manifestation of the (even more general) principle of equal treatment,[52] and since the fundamental freedoms are all *lex specialis* in relation to article 18 of the TFEU,[53] it seems inconceivable that the fundamental freedoms would not protect against discrimination that would otherwise be prohibited by article 18 of the TFEU.[54]

Against the background of article 26(2) of the TFEU, the Grand Chamber's decision in *C.G. Sopora* suggests that all freedoms prohibit unjustified "horizontal" (direct or indirect) discrimination, which would be consistent with the Court's statements in cases such as *Cadbury Schweppes*,[55] *Orange European Smallcap Fund*[56] and *Commission v. Netherlands*.[57] This result can be seen as consistent with previous, perhaps opaque case law: *D*[58] and *ACT Group Litigation*[59] can be read as not rejecting a horizontal comparison as such, but rather as merely (but broadly) seeing different non-residents covered by different tax treaties as not being in comparable situations. Likewise, non-comparability seems to be the core reason for the Court not to have endorsed the concept of "horizontal discrimination" in, for example, *Marks & Spencer*,[60] *Columbus Container Services*[61] and *X Holding*.[62] The Court's rejection of a horizontal comparison in *Haribo and Salinen*[63] may finally be explained against the background of article 26(2) of the TFEU: The Court's finding that, in the context of free movement of capital under article 63 of the TFEU, "the different treatment of income from one non-member State compared to income from another non-member State is not concerned, as such, by that provision", is certainly defensible insofar as the freedom of capital movement under article 63 of the TFEU is not intended to establish a "worldwide" internal market (but rather to eliminate discriminatory treatment of third-country capital movements in comparison with domestic or intra-EU movements).

One other issue is that, in order to attain legitimate objectives, the Court allows Member States to make use of rules that are easily managed and supervised by the competent authorities. The *mere fact* of using flat-rate rules does not, in itself, amount to indirect discrimination or an impediment to the fundamental freedoms. This, in itself, is true. Such a discrimination or impediment would however arise if a flat-rate rule were systematically to give rise to, for example, clear overcompensation. Thus, the Court leaves Member States certain discretion to make use of flat-rate rules. It leaves Member States more leeway if such rules are beneficial rather than detrimental to taxpayers.[64] From the perspective of making legislation efficient, it is to a certain degree understandable and acceptable for the Court to accept flat-rate rules. Such rules may not, however, lead to allowing Member States to uphold or to introduce restrictions to the fundamental freedoms, merely because flat-rate rules can be easily managed and supervised by tax administrations. Such rules would hamper further development of the internal market. It should be emphasized that the Court only allows for restricted use of such rules. Member States should not overestimate their competence to uphold or to introduce flat-rate rules. In this context, the European Commission should closely monitor such rules.

4. The Statement

The Confédération Fiscale Européenne welcomes this decision as a landmark decision. It emphasizes the prohibition of horizontal discrimination in the exercise of free movement by workers and contributes to the development of the internal market.

The Confédération Fiscale Européenne considers that the prohibition of horizontal discrimination also applies to other fundamental freedoms.

51. NL: Opinion of Advocate General Colomer, 26 Oct. 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, para. 97, ECJ Case Law IBFD.
52. *See*, for example, LU: ECJ, 8 May 1990, Case C-175/88, *Klaus Biehl v Administration des contributions du Grand-Duché Luxembourg,* paras. 12-13 and 16, ECJ Case Law IBFD ("principle of equal treatment"); UK: ECJ, 13 July 1993, Case C-330/91, *Commerzbank*, para. 14, ECJ Case Law IBFD ("rules regarding equality of treatment"); SE: ECJ, 21 Nov. 2002, Case C-436/00, *X & Y v. Riksskatteverket,* para. 37, ECJ Case Law IBFD ("inequality of treatment").
53. *See*, for example, IT: ECJ, 23 Feb. 1994, Case C-419/92, *Scholz*, para. 6; FR: ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin*, para. 38, ECJ Case Law IBFD; GR: ECJ, 29 Apr. 1999, Case C-311/97, *Royal Bank of Scotland*, para. 20, ECJ Case Law IBFD. It follows from the wording of article 12 of the Treaty Establishing the European Community, 25 Mar. 1957, EU Law IBFD (EC Treaty) – "without prejudice to any special provisions" contained in the EC Treaty – that the general prohibition of all discrimination on grounds of nationality laid down by article 18 of the TFEU is a *lex generalis* that applies independently only to situations governed by EU law for which the TFEU lays down no specific non-discrimination rules; according to settled case law, the fundamental freedoms constitute such specific non-discrimination rules. *See*, for example, GR: ECJ, 30 May 1989, Case 305/87, *Commission v. Greece*, para. 12 et seq.; UK: ECJ, 4 Oct. 1991, Case C-246/89, *Commission v. UK*, para. 17; NL: ECJ, 12 Apr. 1994, Case C-1/93, *Halliburton Services BV v Staatssecretaris van Financiën*, para. 12, ECJ Case Law IBFD; *Gilly* (C-336/96), para. 37; *Royal Bank of Scotland* (C-311/97), para. 20; DK: ECJ, 28 Oct. 1999, Case C-55/98, *Vestergaard*, para. 16, ECJ Case Law IBFD; NL: ECJ, 13 Apr. 2000, Case C-251/98, *C. Baars v. Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem*, para. 23, ECJ Case Law IBFD; UK: ECJ, 8 Mar. 2001, Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General*, paras. 38-39, ECJ Case Law IBFD; PT: ECJ, 11 Oct. 2007, Case C-443/06, *Hollmann*, paras. 28 and 29, ECJ Case Law IBFD; BE: ECJ, 17 Jan. 2008, Case C-105/07, *Lammers & Van Cleeff*, para. 14, ECJ Case Law IBFD.
54. *See also* AG Opinion in *D* (C-376/03), para. 97. Conversely, if rules are compatible with the freedom in question, they are also compatible with article 18 of the TFEU (*see*, for example, DE: ECJ, 26 Jan. 1993, Case C-112/91, *Werner*, para. 20, ECJ Case Law IBFD).
55. *Cadbury Schweppes* (C-196/04), para. 45.
56. *Orange European Smallcap Fund* (C-194/06), para. 56.
57. *Commission v. Netherlands* (C-521/07).
58. *D* (C-376/03), paras. 53-63.
59. *ACT Group Litigation* (C-374/04), paras. 82-93.
60. *SeeMarks & Spencer plc* (C-446/03), and AG Opinion in *Marks & Spencer* (C-446/03), para. 42 et seq.
61. *Columbus Container Services* (Case C-298/05), paras. 50 and 51.
62. *X Holding BV* (C-337/08), para. 40.
63. *Haribo and Salinen* (C-436/08 and C-437/08), para. 48.
64. *C.G. Sopora* (C-512/13), paras. 33-35.