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Freedom of Movement of  
Workers within the European  
Union  
- a fiscal approach.

Master thesis  
20 points

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International Law and Taxation

VT 2007

# Summary

The Membership of the European Union, brings along guidelines for national tax provisions, securing the freedoms of movement which exists within the European Community. It is above all the four fundamental freedoms of the EC Treaty, the freedom of movement of goods, service, capital and labour which aim to secure removal of obstacles and safeguard the free movement within the inner market of the Community. Having a fiscal approach I first of all intended to investigate the freedom of movement of workers within the EU. This means, analysing case law where tax provisions have breached the Treaty laws of freedom of movement, to see to what extent this freedoms apply.

Along the road I came across another angle which has not been so frequently debated, namely the fiscal approach from the Member States' point of view, not the individuals. This led me to taking into consideration "the flip side of the fiscal coin of freedom". Seemingly the freedom to move have developed further, with the creation of new Treaty articles which expands the right to freely move and reside, on the basis of being a Union Citizen.

The concept of free movement of persons has evolved to also be relevant in a concept of Union Citizenship, which has taken over the role of securing the freedoms for the individual in the EC. The question is however, if this could lead to an unreasonable economic burden for the Member States?

The obligations of the Member States towards the Treaty are also discussed, as well as some trends in the Swedish legal practice in the taxation area, which respectively are linked to Sweden's obligations as a Member State in the European Union.

# Preface

In my final hours as a law student, in the lushly blossoming spring of Lund, I have come to realise that even though I have spent lots of time studying, the real work and knowledge seeking is yet to begin.

With this, I came to realize the true and priceless value of a good teacher, whether travelling on the path of life, seeking knowledge, or facing other unforeseen obstacles.

Thus, I would like to thank some of those people who have been of great importance in my life, my studies and above all, in the making of this paper.

I would firstly like to thank my parents, Peter and Elisabeth, for being patient with me at all times and always being supportive. I would like to thank my Mom for being my guiding light when all seemed dark, and for standing by me in rough times, always giving her warm love and support. You made sure that my roots grew strong, so that I now can grow in any direction I please. I would not be who I am today, if it were not for you.

I wish to thank my sister, Linda, for her loving personality and care, you are my little sunshine.

I would like to thank my boyfriend Kiet and all of my friends/colleagues at work for their warm support, and especially Jacob for his technical support.

Lastly and most importantly, I would like to thank my supervisor Christina Möell, for her calm and patience and for her constructive guidance, which led me back to the right path when I roamed in the wrong directions.

Thank you All!

Susanna Piros June 2007, Malmö.

# Abbreviations

Court	European Court of Justice
ECJ	European Court of Justice
EC	European Community
ART EC	Article in the Treaty of Maastricht
EU	European Union
OECD	Organisation for Economic Cooperation and Development
TEU	(Maastricht) Treaty of the European Union
SV	Skatteverket

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# 1 Introduction

## 1.1 The choice of topic

The idea which finally led me to choose the topic for this essay, came from the phrase; “open your eyes and look beyond the horizon, and try to see the greater picture”. So I did, and the first thing I rested my eyes on was the bridge between Sweden and Denmark, Öresundsbron, connecting the Swedish mainland to the rest of Europe. My thoughts wondered to those who on a daily basis commute<sup>1</sup> to work between the two countries, (statistics claim the number is 9000 at present<sup>2</sup>) making me realise that the world really has become “smaller”. People nowadays are not restricted by geographical distance, to the same extent as earlier, and more and more move abroad in line of work or living. Seeing the simple picture of this movement, I believe the common denominators for the flow of workforce, within the European Union, are the *work opportunities* and the *cost of living*, in other words the rate of income taxation. These two are some of the pivotal factors that I believe influence and promote rational economic individuals to change their geographical location. I chose to dig deeper into the taxation and the fiscal factor, and since there already exists an ambition, in the European Community (EC) to promote and facilitate free movement within the Union, my work is linked closely to it.

## 1.2 Background

When it comes to the sovereignty and the right to tax; in other words the fiscal territory of each Member State of the European Union, there is no regulation within the area, on Community-level, stating any frames, guidelines or restrictions regarding what regulations each Member State may or may not put up for their nation. This has until recently led to that States have had the conception that the area of taxation, is clearly and purely within the sovereignty of each Members State. This however, has proved to be a misconception, since the ECJ has shown itself to be more and more restricting and narrowing down the fiscal sovereignty of the Member States. The situation is, as Graetz and Warren puts it, changing: “*In recent years, the European Court of Justice (ECJ) has invalidated many income tax law provisions of European Union (EU) member states as violating European*

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<sup>1</sup> See the homepage, for statistics of the traffic over the bridge, at <http://osb.oeresundsbron.dk/trafficstat/yeardetails.php?lang=46>

<sup>2</sup> See homepage and facts about working in the Öresunds-region: <http://www.oresundsregionen.org/bff000c/code/46>

*constitutional treaty guarantees of freedom of movement for goods, services, persons, and capital*<sup>3</sup>

In a case, from 1986, called *Avoir-fiscal*<sup>4</sup>, which is well spoken of, the ECJ cleared that tax provisions hindering the *freedom of establishment* can be held of a breach against the EC Treaty. The fundamental rights of the EC treaty could not be put aside due to a lack of harmonization. This kind of thinking has ever since *Avoir- Fiscal* been showed to more and more lead to the encircling and refining of the national tax jurisdiction of the Member States.

Since the Judgements from the ECJ and the regulations and directions regarding this area has become quite vast during the years since *Avoir-Fiscal* first came with its impact judgement, there is a need to narrow down the field of research before exploring or trying to analyze a certain topic of interest. (see further under 1.5 Delimitation.) As it seems today, there is no “freezone”<sup>5</sup> within taxation provision, and national Tax provisions must be in accordance with or be applied and formed within the scope of the EC Treaty.

### 1.3 Aim

The basic underlying assumption is the total sovereignty of each Member State in taxation areas. The Membership of the EC brings however some frames and limitations, when it comes down to it, to the freedom of each state to decide upon its taxation subjects. Still it is up to each member state to decide the grounds of taxation within its area, however this seems to have become more and more elusive over time as ECJ (and the Membership in the EU) requires respect for the freedoms of movement at the same time as tax-subjects (in this case individuals) move around within the EC.

My aim is to investigate the freedoms to move and reside for individuals, furthestmost workers, within the EC. This includes workers and cross-border travellers as well as those who changed their place of residence in line of their work. It also means discussing the personal circumstances of these workers, such as mutual taxation of spouses or other circumstances which are relevant from a taxation point of view. Part-time and season workers are also included in this paper, as well as the rights of work seekers, in regards of movement and residing in a Host State.

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<sup>3</sup> Graetz Michael J, Warren Alvin C Jr; “Income Tax Discrimination and the Political and Economic Integration of Europe”, The Yale Law Journal, 2006 Vol; 115, p. 1186-1255, Proquest.

<sup>4</sup> Case C- 270/83 *Avoir Fiscal* [1986] ECR 273.

<sup>5</sup> Ståhl, K. Österman, R: EG-skatterätt, 2.ed, Iustus Förlag, Uppsala, p. 59.



Since the topic is closely related to freedom of establishment this is also briefly mentioned where relevant, however the focus will mainly be on the movement of workers, from a fiscal point of view.

As the workers (the tax subjects) exercise free movement, I intend to bring forward a discussion of which the correct taxations grounds are - is nationality or residence the crucial factor of where to be taxed? How widely are the Treaty freedoms applicable? My goal is to see to what extent and in which situations the Treaty's freedoms of movement apply and which national provisions are infringing the Treaty. In this context there is grounds to also include a discussion the reasoning of the ECJ.

Seeing the free movement from the Member States fiscal point of view, I find it interesting to also discuss the concept of the Union Citizenship. The discussion of the rights of individuals seeking employment are brought into the light, as well as the rights of those with no economic nexus to their Host State. The Union Citizenship lacks connection to taxation in its case law, however it brings along and secures a further extensive right to move freely and reside, which most likely has a *fiscal consequence* for the Host State. The EC is meant to be a free zone for workers to move within in search of work, however this also brings along the consequence that a work seeker who currently is without occupation, is an economical and social burden for the member state where he resides. It is this fiscal consequence I intend to discuss: to what extent the free movement is reasonable (from a state sovereignty point of view).

Lastly I will mention how far the Obligations seem to go for a Member State to apply and follow Treaty law, where after I bring up some of the latest tendencies in Swedish legal practice. In final I briefly discuss if harmonisation of taxes on a Community basis is the only solution for the future or if it at all is to be preferred.

## **1.4 Method**

To be able to give as a fair reflection as possible, given on how the Case-law stands today, as well as on what grounds the ECJ reasons when it comes to discrimination questions, I strived to obtain and analyze as many relevant Judgements from ECJ as was given opportunity by the restriction of time. My aim is to briefly touch upon relevant case law, to thereafter indicate the changes of reasoning from the ECJ and their line of reasoning regarding justification-grounds for breaches. Furthermore I focus on including relevant comments and articles from well known analytical journals as well as other doctrine and literature within the area of European Taxation. Using the theoretical legal method, with older doctrine (from over two decades ago, when the EC was in its cradle) and newer doctrine (material from 2007)

I strive to show the development and tendencies in the line of reasoning of the ECJ, where newest articles on the subject also summarise the outcome of the judgements from the ECJ.

Furthermore have the use of some Directives and Regulations been pinpointed, however these do far from claim to be exhaustive, on the contrary, they only constitute examples within the area. Furthermore my intention is to bring about a discussion for the future solutions regarding international taxation and the cooperation of members states when it comes to taxation within the community.

## 1.5 Delimitation

The main reference which has been made is the **EC Treaty Article 8a**, stating the “freedom to “*move and reside freely*” within the territory of the member states,” however as this paper concerns free movement of workers, ART 39 EC is also highly relevant. Further articles are also taken into consideration concerning the topic and included where relevant. This concerns Article 6, 8, 10, 12, 17, 18, 39 and somewhat 48 - 51 EC.

As the topic of freedom of movement is closely related to the freedom of establishment, (ART 43-44 EC), I felt the need to also include and mention some cases regarding the freedom of establishment, which are closely related to the free movement of workers. However it is the *movement of workers*, in regard of *individuals*, which is in focus, and thus I have tried to limit to bring up cases with freedom of *establishment*.

Since my interest is merely aimed at investigating the movement of physical individuals freedom of movement, I will focus on Cases which are dealing with ART 39 and has some tax-connection. In some regards the fiscal approach brought me to include cases regarding Union Citizenship, since the free movement of individuals in this aspect brings about *fiscal* burdens for the member states. The paper in this regard makes a swing towards the expanding of the freedom of Union Citizens. As Case law is vast in the area of Union citizenship, I have tried to limit the cases mentioned in this context, having the fiscal consequences for the member states as an underlying focus. The mentioned Case-law (or the other material in that regard) does not claim to be exhaustive on the field of Union Citizenship, on the contrary, it is merely a flashlight for reflection over the consequences of the flip side of the fiscal coin of freedom of movement.

Due to the restriction of time, the collection of resources (Cases, Treaty Law, doctrine and articles) was narrowed down and halted by the end of march 2007.

# 2 Community Law

## 2.1 Brief historical background

The roots of cooperation on an international level can be traced back to 1952 when the European Coal and Steel Community declared giving up their sovereignty to the supranational control.<sup>6</sup> This later on developed through the Treaty of Rome in 1957 creating the European Economic Community, EEC. The European Economic Community, EEC, has as foremost aim to create a common economic market without any (economic) barriers within the community, when it comes to trade and exchange of labour between the Member States. To further deepen the integration process, and make it more effective, the Member States<sup>7</sup> of the EEC amended the European Unity Act with a free inner market for goods, services and persons and capital. As a next step the economic coordination and unification was further chiselled out, which was achieved by the Treaty of Maastricht in 1993<sup>8</sup>. The treaty is also named the Maastricht Treaty of the European Union (TEU), and it eliminated the word “economic”, from the EEC, making it nowadays the *EC Treaty*. This is the Treaty we apply as Primary Community Law<sup>9</sup> at present. The EC Treaty also introduced the Citizenship concept, as well as the freedom to move and reside, for nationals of a Member State, (ART 17-22 EC). This freedom for the nationals applies, even “regardless of an economic nexus,”<sup>10</sup> in the same manner as directive securing right of residence.<sup>11</sup>

Further on, directives, regulations and secondary law have been added, step by step, wherever and whenever Case law from the European Court of Justice (hereafter called ECJ) brought an important problematic to the attention of the Commission.

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<sup>6</sup> Homepage of the European Union. Information:

[http://www.eu-upplysningen.se/templates/EUU/standardTemplate\\_3132.aspx](http://www.eu-upplysningen.se/templates/EUU/standardTemplate_3132.aspx)

<sup>7</sup> There existed 6 Member States, at the start when the Act was first signed, however 27 at present., see the homepage for information on the European Union;

<http://www.eu-upplysningen.se>

<sup>8</sup> Treaty of the European Union (TEU or EC Treaty), signed on 7 February 1992 in Maastricht, which entered into force on 1 November 1993.

<sup>9</sup> The name EC Law or Community Law, will be used synonymously henceforth, with reference to the Maastricht Treaty, 1993.

<sup>10</sup> Terra, Ben J.M; Wattel, Peter J; “European Tax Law,” 4. ed. Kluwer, Hague, 2005, p. 24. (hereafter Terra, Ben; ”European Tax Law”.)

<sup>11</sup> Council Directive 90/364/EEC on the right of Residence of 28 June 1990.

## 2.2 Lines of development within the EC taxation area

### 2.2.1 First line of development – Positive integration

Ever since the EU came into force the Memberships of EC has led each Member State towards a closer and tighter community. The first line of development concerns the agreement and presentment on Directives. From the beginning of Sweden becoming a member in the EU in 1993 the influence of the Community and the EC Treaty in the area of indirect taxation has been a known fact (one which might not have been crystal clear at the point of time when Sweden was about to enter the EU<sup>12</sup>, however that's another issue). It was not until 1990 that the influence of the EC in matters of direct taxation also became clear, when there was unity on the "first tax-package", the Fusion and Savings-Directive<sup>13</sup>

In 2003, the second tax package<sup>14</sup> was presented and adopted, which strives against harmful tax competition. This contained two Directives; the Interest/Royalty- and the Savings-Directive. Even as this paper is being written the difficult process of putting forward a solution for unification of the national tax provisions is going on. This process is made even more difficult by the fact that unanimity is required for a proposal to be adopted. Agreement on a proposed provision is further hindered by most member states being reluctant to make decisions within the area of direct taxation. One of the reasons for member states trying to cling on to their taxation rights and their resistance towards giving up their sovereignty is that taxes are a fiscal instrument used to redistribute the income and is thus needed to sponsor the national social security systems. Another reason is that member states use tax provisions as a means of economic competition, where low tax levels encourage national investments.<sup>15</sup> The stopping of a "race to the bottom" in regards of taxation levels can in this context only be achieved on Community level. Otherwise the only counterforce within the nation itself is the need for fiscal income which can only be achieved through raising taxes. Thus have many scholars agreed on that in order to achieve unity on an international level regarding taxes there is a need for cooperation on a Community level. (See the discussion below: 7. Tax - Harmonisation in EC?)

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<sup>12</sup> Dahlberg, M., Internationell Beskattning – en lärobok, Studentlitteratur, 2005, Lund, p.210, (hereafter Dahlberg, M; Internationell beskattning.)

<sup>13</sup> Directive 90/434/EEG on 23 July 1990, on a mutual taxation system for fusion, fission, transfer of assets and change of stocks or shares concerning companies in different member states. Extensive changes were carried out in this directive in 2005, through Directive 2005/19/EG, ( 17 Feb 2005).

<sup>14</sup> Dahlberg, M; Internationell beskattning, p 210.

<sup>15</sup> Ibid.

## 2.2.2 Second line of development – Negative integration

Beside the slow development process of bringing about directives, and closely co-ordinating national economic policies, which is known as “positive integration” there is also the parallel existence of “negative integration”<sup>16</sup> of the EC-Law, which is “integration through legally enforceable prohibitions on certain measures of Member States.”<sup>17</sup> If no positive integration has taken place, within a certain matter, Member States have free hands in order of putting up regulations for it. However, this national sovereignty is restricted by the negative integration, i.e. by the four freedoms stated in the in the EC Treaty.

When choosing between the two, the positive integration is of course to be preferred,<sup>18</sup> however the slow inquiry-process can not always catch up and present solutions in time, to relevant taxation issues. In such case it is up to the ECJ to interpret the Treaty law (ART 230 EC) to give its interpretation to whether the member states provisions’ infringe the freedom of EC law or not.

A so called third line of development is in theory based on the concept of Common consolidated tax bases, a system that would work parallel to the ordinary national taxation system of company taxation. This would be that a few member states join and together establish a higher degree of integration.<sup>19</sup> However there are no indications of this happening at present.

## 2.3 General Principles

Generally seen the tax rates can be controlled on two different levels, the first being on the national level, where each member state practices its sovereignty – which is a fundamental principle. The second level is the international niveau, where tax treaties enter into the picture, and where Organisations such as the OECD and the EU are of great importance. The EC Treaty furthermore have a few main principles, which are thought to be the framework and guiding of Community Law. Some of these principles (ART 90 EC) are generally known as *the principle of neutrality*, *the principle of proportionality* and most importantly the *principle of non-discrimination*, or the principle of so called equal treatment. All of these basic legal principles, where the principle of *legal certainty*<sup>20</sup> as well as predictability, can further be added, are abstract but commonly known and accepted principles. They stem from Member States national legislations,

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<sup>16</sup> See Terra, B; European Tax Law, chapter 3.1.2, p. 22 ff. and Dahlberg, M; Internationell Beskattning , p. 211.

<sup>17</sup> See Terra, B; European Tax Law, p. 22.

<sup>18</sup> Dahlberg, M; Internationell beskattning, p. 211.

<sup>19</sup> Ibid.

<sup>20</sup> See further Raitio, Juha; The principle of legal certainty in EC law, Kluwer, London, 2003.

and constitute supplementary principles of interpretation<sup>21</sup> of the Treaty. These underlying principles are supposed to transpire the entire Treaty, and create the underlying foundation which national legislation should be built upon and in accordance with.

One example of such Case law that brought about specific regulations is the *Biehl-case*.<sup>22</sup> There it was stated by the Court “*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.*”<sup>23</sup> Thus the ECJ confirmed what earlier had been known and spoken of as the *principle of equal treatment*.<sup>24</sup> This statement from the Court is the reason for the Council laying down a requirement in ART 7 in the Regulation (ECC) No 1612/68<sup>25</sup> on free movement of workers within the Community, that workers who are nationals of a Member State shall enjoy the same tax benefits in the territory of another Member State, as a national would if working there. However in that regard, the Case law from the ECJ most likely has the largest impact when it comes to free movement of workers, since in ART 39 (2) EC proclaims freedom at a larger mass of individuals than merely workers.

## 2.4 Relevant EC Treaty provisions

There are certain articles in Community Law, which secures the right and the freedom to move. There are above all four fundamental freedoms in the EC Treaty, which no national provision may infringe<sup>26</sup>. These freedoms aim to secure removal of obstacles and safeguard the free movement of goods, service, capital and labour within the inner market. As this paper deals with freedom of movement of workers it is ART 39 EC and the freedom of establishment which is most relevant.

Apart from the four fundamental freedoms of the EC Treaty there are further provisions which aim to ensure the freedom of movement within the EC. Relevant provisions in the context of income taxation of workers, is also ART 6 EC, which deals with discrimination on grounds of nationality and origin, as well as ART 8a EC, concerning the freedom of movement and residence on basis of the Union Citizenship. The latter freedom is provided to all Citizens of the Union<sup>27</sup>, and states the following:

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<sup>21</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 48.

<sup>22</sup> Case C-175/88 Biehl, [1990] ECR I-1779.

<sup>23</sup> Case C-175/88 Biehl, [1990] ECR I-1779 paragraph 12.

<sup>24</sup> Concerning the principle of equality see further: Gerard T.K. Meussen The principle of equality in European taxation, Kluwer, Hague 1999, and Dashwood, A, O'Leary, S (ed.s): The principle of equal treatment in EC law, Sweet & Maxwell, London, 1997.

<sup>25</sup> Regulation (ECC) No 1612/68 of 15 Oct 1968, on free movement of workers within the Community.

<sup>26</sup> Restrictions of the free movement of workers are legitimate if justified by objections based on health, security or other reasons of uttermost importance to the Member State, ART 39 (3) EC.

<sup>27</sup> Union Citizenship was introduced in ART 8 EC, (previously ART17-22 EC) where the freedom to move and reside had earlier been stated in ART 18 EC.

*Article 8 EC:*

*1. Citizenship of the Union is hereby established.*

*Every person holding the nationality of a Member State shall be a citizen of the Union.*

*2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.*

*Article 8a EC:*

*1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.*

*2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.*

*Article 39 (2) EC*

*1. Freedom of movement for workers shall be secured within the Community.*

*2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*

Within the scope of this paper, it is the freedom declared in ART 39 (1-2) EC, which specifically states the freedom of movement of workers, which is relevant. The development and process for bringing such a regulation into force is a question of the Commission, and it is up to the representatives of each Member States, which constitute the Commission, to agree upon Regulations. However most of the problematic come to the Commissions attention through cases tried in the ECJ. Judgements of the ECJ in this sense have the effect of clarifying how the treaty should be interpreted<sup>28</sup>. Directly and literally, the case law also brings about the most important development of the Community Law: through its stated interpretations of the Treaty Law which are presented in ECJ's judgements, but also indirectly through inspiring the Commission to bring about more detailed and clear regulations on the area.

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<sup>28</sup> ART 230 EC, stating that ECJ has the right to interpret the Treaty Law.

# 3 Definitions of importance

## 3.1 The concept of workers weakened

Until recently there was great weight put into the concept of being “a worker” to be able to exercise the right of free movement. In cases such as *Levin*<sup>29</sup> it was the question of who is to be considered a worker which was highlighted. The conclusion was however that the motives which have attracted the individual to seek employment in the Host State, was not to be questioned, and that ART 39 EC also covers workers who earn much less than what is required for subsistence. In other words it is the freedom to move and reside which is prioritised. As the cases below hopefully will reveal, the tendency is that it is the breach of the mentioned freedoms that is relevant in the cases. And rather than elaborating on the definition of the tax subject being a worker or not, the discussion tends to linger on residency criteria and possible discrimination.

## 3.2 Discrimination

### 3.2.1 The negative sense of discrimination

When speaking of discrimination there are two types; direct (“open”) and indirect (“hidden”) discrimination<sup>30</sup>. Direct discrimination implies discrimination on grounds of nationality, a case which is not so frequently apparent when it comes to physical subjects. When considering a provision in the area of direct taxation of an individual, it is natural to have the residence as an essential “connecting factor”, since this is one of the decisive criteria which defines the tax competence of the subject (the individual). Thus it not necessary that “discrimination on the basis of residence is *ipso facto* contrary to Treaty principles”, since the nature of the topic clearly requires involving residence.

Indirect discrimination on the other hand is where the differentiating criteria isn't the nationality (or citizenship), however the effect is the same as if it would have been the decisive factor. Here the complex of problems is that the domicile doesn't necessarily coincide with the citizenship/nationality. Thus it is of importance to sort out what discrimination really is, since as Lyal puts it; “discrimination in the sense in which we use it here is not simply differentiation”<sup>31</sup> which would be the primary translation in any dictionary.

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<sup>29</sup> Case C – 53/81 *Levin*, [1982] ECR I- 1035.

<sup>30</sup> Dahlberg, M; *Internationell beskattning*, p. 228.

<sup>31</sup> Lyal, R; *Non-discrimination and direct tax in Community Law*, p. 68, EC. T.R., 2003.



The concept of discrimination is far from new and it has been discussed on various grounds<sup>32</sup> for a long time now and it is still being debated. As Van Raad wrote in 1986, “in modern parlance the neutral meaning of the word ‘discrimination’ has virtually disappeared.”<sup>33</sup> As we refer to the word today we implicitly mean the *negative kind* of discrimination, where a person is treated less favourably than the person in comparison. This is in my opinion, still valid, today, more than two decades later. Discrimination can thus basically be said to amount to “a negative unequal treatment unmotivated by objective reasons.”<sup>34</sup>

In short there are two situations of discrimination: when *like (or similar) cases are treated differently or when unlike cases are treated the same way*.<sup>35</sup> As stated by the Court in the *Gschwind-case*; ways leading to discrimination, could only arise through “application of different rules to comparable situations, or the application of the same rule to different situations.”<sup>36</sup>

### 3.2.2 Different categories of discrimination

In addition to these two situations, Lyal stresses the importance of pointing out a *third kind of category*<sup>37</sup>, which is connected to the principle of proportionality; that is when situations which differ very little are treated in very different manner. This is a situation which I see relevant to consider for a moment. As the concept of what is discriminatory is already mentioned to be changing over time, and vary from place to place, it is interesting to consider what proportions of differentiation we consider to be discriminatory, since it eventually is all about what we *see as reasonable* to accept. I would like to agree on that this is a relevant dilemma and it has to deal with what is considered to be acceptable and what proportions of negative treatment crosses the border of what is not considered to be acceptable and is thus classified as discrimination. Van Raad has already pinpointed the problem of the changing social acceptance of what is reasonable. He put forward that apart from being negative; the term different

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<sup>32</sup> See for example; Brinch-Jørgensen, E; Union Citizens, Free Movement and Non-Discrimination, Jurist- og Ökonombundets förlag, 1996, Denmark; Professor Dr van Raad, K; Non-discrimination in International Tax Law, Kluwer Law, 1986 ; and Sundberg-Weitman, B; Nondiskriminering i EEC: diskrimineringsförbudet till säkerställande av arbetstagares och företags rörlighet över gränserna, Stockholm, 1973.

<sup>33</sup> Professor Dr van Raad, K; Non-discrimination in International Tax Law, p. 8, Kluwer Law, 1986.

<sup>34</sup> Bergström, S; ‘Restrictions on Free Movement and the Principle of Non-Discrimination in EC Law and their Implications for Income taxation’ in Lindencrona, G; Lodin, S-O and Wiman, B; (ed’s) “*International studies in taxation : law and economics*”, Iustus förlag, Stockholm, 1999, pp. 45-57, (p. 47).

<sup>35</sup> See case law: Case C- 80/94 Wielockx, [1995] ECR I-2493, paragraph 17, and Royal Bank of Scotland.

<sup>36</sup> Article” Gschwind decision: German tax law not discriminatory for non-resident married couples; Robert, ; from European Taxation, 2000, Volume 40, Issue3, p. 115.

<sup>37</sup> Lyal, R; Non-discrimination and direct tax in Community Law, p. 68, EC. T.R., 2003.

treatment also implies grounds that are *unreasonable, arbitrary or irrelevant*. Whether a distinction is one of the latter or not, is all a matter of judgement and this judgement varies from time to time.<sup>38</sup> In the very same context it might vary over time, what can be considered proportional or reasonable and what proportions of unjust treatment are to be called discrimination according to Lyal's third categorisation of differentiation.

### 3.2.3 Comparison of relevant factors

A further aspect, which I find genuinely interesting, is what Davies discusses; it is important to consider *who* is being compared, in regards of discrimination. As he points out: "the fact is that discrimination cannot be intelligently assessed without some kind of what competition lawyers would call market definition.<sup>39</sup> There is no way of speaking correctly about discrimination without examining who *actually, or realistically potentially*,"<sup>40</sup> is affected.<sup>41</sup> I clearly agree with this, since it makes no sense to compare situations and in a technical term, state that there is no discrimination, when in fact it is only certain groups (in most cases, foreigners and non-nationals) who are affected. In regards of tax provisions which might be discriminatory, this seems however be dealt with through the fact that it is the tax system as a whole which is considered, when a case is judged at the ECJ.

There are some claiming that the ECJ has moved from a discrimination analysis to a "restriction-analysis"<sup>42</sup> The major difference between the two is that the Court in the latter case would leave out the comparative part of the situation and merely state that there are provisions which restrict the freedoms.

## 3.3 Non-discriminatory restrictions and the "barrier approach"

A national provision might be in breach of the Treaty provisions without being directly or indirectly discriminatory. It is not always easy to distinguish between direct and indirect discrimination, or to decide whether

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<sup>38</sup> Van Raad mentions examples as "slavery in the ancient Rome and Athens, as well as the systems of India and apartheid in Africa amongst others... see Non-discrimination in International Tax Law, p. 8-9, Kluwer Law, 1986.

<sup>39</sup> The term stems from Davies; Nationality Discrimination in the European Internal Market, p 88 and Snell, J. ; Free movement of goods and services in EC law, OUP, 2002, pp. 84-85.

<sup>40</sup> Davies, Gareth; "Any place I hang my Hat? Or: Residence is the New nationality", European Law Journal vol. 11. No1, 2005, pp. 43-56, (at p.47).

<sup>41</sup> The case Davies refers to in this context is Case C- 388/01 Commission vs. Italy [2001] ECR I-721, which concerned discounts given to resident Italians, to enter local museums, and whether these discounts were discriminatory on grounds of nationality.

<sup>42</sup> Dahlberg, M; Internationell Beskatning, p.232,

a case is about discrimination or if it is about non-discriminatory regulations<sup>43</sup>. Case law indicates that the borderlines are indistinct. During the last few years, the ECJ has shown a tendency to avoid explicitly judging provisions (or a situation in the case at hand) which are an infringement of EC Law is discriminatory or a non-discriminatory restriction.<sup>44</sup> Dahlberg calls this behaviour “*the barrier approach*.”<sup>45</sup> With this he implies that the ECJ only declares a national provision to constitute a hinder of a basic freedom of the Treaty, without analysing the case in terms of discrimination. A reason for this might be the unclear boundary between direct and indirect discrimination, and the non-discriminatory restrictions. Further reasons might be dissonance within the Court regarding the criteria after which the discrimination and restrictions should be defined.

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<sup>43</sup> Dahlberg, M; Internationell Beskattning, p. 231.

<sup>44</sup> See Advocate General Jacobs proposal on Case C-136/00 Danner.

<sup>45</sup> ”Restriktionsmodellerna” see Dahlberg, M; Internationell Beskattning, p. 231.

# 4 Free movement of workers

## 4.1 The development of the cohesion-concept

The fundamental freedom of movement is stated in ART 8a EC, where it is stated that there exists a “freedom to move and reside freely within the Member States”. When such freedoms have been breached directly or indirectly the Court have found different ways to deal with the breach. In some of the cases a breach has lately been justified, indicating that even if national rules may seem discriminatory and infringe the Treaty freedoms, they may be sustainable. It was first in the *Gebhard - case*<sup>46</sup> (a case dealing with the freedom of establishment) where the so called “*Rule of Reason – test*” appeared in print. This test was the first to put up a clear definition of conditions that would be acceptable and justify a breach of Treaty Law. The conditions were that the provision should be applicable in a non-discriminator manner, be motivated by reason of public interest, aimed at maintaining the purpose and lastly be proportional to means they aim to achieve.

During the ensuing years and cases there have appeared many grounds that the Member States tried to apply as justification grounds. The Court seems to have accepted some justifications. At the start these were based on grounds of cohesion and coherence of the tax system<sup>47</sup>. Some of these generally accepted justification grounds have been tax evasion and avoidance, maintenance of the cohesion of the taxation system, to achieve an efficient tax control, and protect the taxation territoriality principle. (The latter may be discussed!) Most of these grounds are furthestmost applicable to breaches of freedom of establishment, an area which lies close to the freedom of movement of workers in some aspects. Thus I will not dive into all of those cases more in detail, however in the area of freedom of movement the connecting factor seems to have been the existence of cohesion.<sup>48</sup> According to Vanistendael this will “*constitute the major fault line in the tectonics of European taxation, along which minor and major quakes will eventually shape the tax landscape of the Member States.*”<sup>49</sup> Most cases have been concerned with the freedom of establishment, with the *Bachman - case*<sup>50</sup> in the lead, where cohesion was first brought up. Some cases, however, have dealt with the freedom of movement of workers. One example is *Schumacker*, which did not itself contribute very much to the development of the cohesion doctrine. The ensuing *Wielockx - case* however

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<sup>46</sup> Case C- 55/94 Gebhard, ECR – I 4165.

<sup>47</sup> Vanistendael, F; The ECJ at the Crossroads- Balancing Tax Sovereignty against the Imperatives of the Single Market, p. 413, European Taxation, 2006.

<sup>48</sup> Vanistendael, Cohesion - the Phoenix rises from his ashes, EC Tax Review, 2005-4.

<sup>49</sup> Ibid, p. 208.

<sup>50</sup> Case C-204/90 Bachmann v Belgium [1992] ECR I-249.

clarified the concept of cohesion more. It was then elucidated that a breach of Treaty doctrine can be justified - *by a direct link*<sup>51</sup>, *instead of an indirect economic or social link*.

There are also cases where the Court merely pinpointed the lack of consistency of the national law with the Community Law, without giving any solution to the problem in the case, but giving the task to the national Court to review their provisions and see to their compatibility with the Community Law. (See further section 6.1.3 below.) In this following chapter I intend to briefly describe some of the relevant cases, where the freedom of movement of workers have been discussed, on different grounds.

## 4.2 Relevant Case Law

### Schumacker

The case concerned which requirements were needed to obtain tax benefits as a non-resident, working in another Member State than that of Residence. A German tax law was of interest in the case, which was applicable without regard to the nationality however; it made distinctions based on where the place of residence of the worker was. The case, which was ruled down in 1995, dealt in short with direct taxation, and concerned a man (Roland Schumacker) residing in Belgium and working in Germany during the years of 1988 and 1989. Whereas 90% of Schumacker's taxable income was originating from Germany during this period,<sup>52</sup> he did not have taxable enough income in Belgium to claim taxation benefits that he would otherwise have gained because of his personal circumstances there. The German tax rules at the time relevant,<sup>53</sup> were providing for the adding up of the incomes of the spouses, where after splitting the sum in two, when the tax was being calculated. The purposes behind these rules were to decrease the progression of tax for those spouses who had incomes of quite different size. Importantly the relevant provisions led to that the German tax reliefs were available only if the person was living permanently in Germany, putting the important decisive factors at the place of residence! The rules could not apply to a person working in Germany while living abroad, (even though at least 90% of his total income was stemming from Germany.) Such a person were thus more taxed than the domestic resident German worker, since he could not make use of the benefits, on grounds of him being non-resident.

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<sup>51</sup> Vanistendael, F: Cohesion - the Phoenix rises from his ashes, p 212, EC Tax Review, 2005-4.

<sup>52</sup> Case C- 279/93 (Roland) Schumacker, 1995 [ECR] I-225.

<sup>53</sup> At this period of time the Law reducing taxation for cross-frontier workers; so called "...Grenzpendlergesetz" of 24 June 1994, had not yet entered into force. (About further comments on this subject see: Broberg, Morten and Holst-Christensen, N; Free Movement in the European Union, p. 576, DJOF Publishing, Copenhagen. 2004.)

## Justification Grounds – Cohesion not accepted

When looking for justification to such a discrimination, the Court considered the cohesion of the tax system, which was the main reason justifying the discriminatory tax provisions in the *Bachmann-Case*.<sup>54</sup> The argument was that, “*there is a link between the taking into account of personal and family circumstances and the right to tax worldwide income. Since the taking into account of those circumstances is a matter for the Member State of residence, which is alone entitled to tax worldwide income, they contend that the State on whose territory the non-resident works does not have to take account of his personal and family circumstances since otherwise the personal and family circumstances of the non-resident would be taken into account twice and he would enjoy the corresponding tax benefits in both States*”.<sup>55</sup> The justification ground of cohesion could therefore not be upheld in the case of Schumacker. Where this is the situation, “the Community Principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits should be granted to him.”<sup>56</sup> Further, the Court referred to exchange of information between the member states.<sup>57</sup> Thus there is no real hinder regarding administrative issues, to not take the non-residents’ domestic (personal and family) circumstances into account.<sup>58</sup>

## Reasoning and conclusion of the Court

The Court firstly reasoned that not allowing resident and non-resident workers tax benefits on the same grounds is in itself not discriminatory, since the two categories of workers cannot be compared.<sup>59</sup>

The Court stated further, that it is not in itself a breach of Community Law to rule out provisions in national law which denies non-residents to make use of tax deductions of the type which relates to his domestic situation and the thereby arising burden to provide income for his family.<sup>60</sup> This is because the best ability to tax is given to the state of residence of the individual. This is based on a primary assumption that the income received from a non- resident state merely constitutes a part of the individuals’ total income, and thus it is easiest for the State of residence to get and overview of the individuals’ income- and tax abilities a whole.

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<sup>54</sup> Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249, paragraph 28

<sup>55</sup> Case C- 279/93 *Schumacker*, paragraph 40 -42.

<sup>56</sup> Case C- 279/93 *Schumacker*, paragraph 42.

<sup>57</sup> The Court indicated to Council Directive (77/799/EEC of 19 December 1977) regarding “mutual assistance by the competent authorities of the Member States in the field of direct taxation”

<sup>58</sup> Case C- 279/93 *Schumacker*, paragraph 45.

<sup>59</sup> Case C- 279/93 *Schumacker*, paragraph 34.

<sup>60</sup> Ståhl, K. Österman, R: EG-skatterätt, p. 101

Exactly how large part of his income should be received in the state of work, was still not clear from the judgement in *Schumacker*. It was however stated that if the non-resident worker received *the major part* of his income in the working state and no income of significant value in his State of residence, he should gain access to taxation benefits in the same manner as a resident German worker.<sup>61</sup> Otherwise it would be discrimination in the case, due to the fact that his family circumstances would not be considered at all, in neither of the states.<sup>62</sup>

In this context the Court concluded that benefits which are related to the income must be handled in the same manner to non-residents as to residents since these are related to the income. On these grounds the Court granted Schumacker refund of overpaid payroll tax, on the same basis as resident German workers. A tax criterion based on residency in this manner, is “liable to operate mainly to detriment of nationals of other member states, since non residents will be more likely to be foreign nationals,”<sup>63</sup> and thus the Court assumed this rule to be indirect discrimination, (and a hinder of the free movement of labour/ workers within the Community.)

### **Difference between Schumacker and Gilly**

A very similar case was the *Gilly – case*,<sup>64</sup> where Mrs Gilly worked in Germany, while living with her husband in France. While French authorities took her personal circumstances into consideration, the Germans didn’t.

In the case it was thereby said that authorities should take the personal circumstances into account to the *extent that it is possible*. The courts stated, with reference to *Schumacker*, that the situations of residents and non-residents are not comparable. In this regards the fall point was on the assumption that income received by a non-resident is most commonly constituting only a part of his total income, and the mere part is concentrated at the workers place of residence. Thus Gilly’s personal circumstances were not obliged to be taken into consideration by the German authorities as they were with Schumacker!

### **Aftermath of the judgement in Schumacker**

The judgement in Schumacker Article 48 EC (now ART 39 EC) was thus interpreted as “being capable of limiting the right of a Member State to lay down conditions concerning the liability to taxation of a national of another Member State.”<sup>65</sup> Further it may be mentioned, that after this Judgment in the *Schumacker-case* the German tax provisions were changed, and now it is allowed for non-resident workers to use German tax benefits if at least 90%

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<sup>61</sup> Case C- 279/93 Schumacker, paragraph 36.

<sup>62</sup> Case C- 279/93 Schumacker, paragraph 38.

<sup>63</sup> Ibid.

<sup>64</sup> Case C- 336/96 Gilly [1998] ECR I – 2793.

<sup>65</sup> Conclusion of the Court in Schumacker.

of the total income of the spouses is liable for tax in Germany. Thus the requirement for residency to obtain tax benefits was removed.

## **Wielockx**

Quite close after the *Schumacker-case* followed the *Wielockx-case*<sup>66</sup>, which was about deductibility of contributions to pensions funds, from the taxable income. The case mainly focused on whether a breach of ART 39 EC was at hand or not, and the reasoning and main outcome was quite similar to *Schumacker*.

The case was about whether the State was obliged to allow non-residents right to personal deductions.<sup>67</sup> Mr Wielockx who was resident in the Netherlands, received his entire income there and was liable to tax there. He claimed permission from the tax authorities to deduct from his taxable income, a contribution made to a pension reserve. His claim was refused, which brought the case further to the next instance whereas the tax Chamber which received the appellation, saw a possible breach of the EC Treaty, and referred the question to the ECJ.

The court stated that the right to exercise direct taxation falls within the competence of the Member State, however there is a need for the State to exercise this right with respect to Community law, and “therefore avoid any overt or covert discrimination by reason of nationality”<sup>68</sup>, with further reference to *Schumacker*.<sup>69</sup>

## **Conclusion of the Court**

The court came to the conclusion that it is not necessary a hinder of the treaty freedoms to deny non-residents access to the type of tax-reliefs at hand, since their non-residency creates a situation which is not comparable to the one of resident workers.<sup>70</sup> The emphasis was also here on the fact that the main part of the income normally originates from the state of residence and thus enables that state to the best ability to tax the income.

The exceptions, as already mentioned in *Schumacker* above, occur when the main part of the income stems from the State in which the worker is non-resident. In such a situation the worker *can* be regarded as in the same objective situation as the resident workers, and should gain access to all reliefs and other positive treatment on the same basis as residents.

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<sup>66</sup> Case C- 80/94 *Wielockx v. Inspecteur der Directe Belastingen* [1995], p. I-2493. which was handed down in august 1995 (6month after *Schumacker*)

<sup>67</sup> Ståhl, K. Österman, R: EG-skatterätt, p. 129.

<sup>68</sup> Case C- 80/94 *Wielockx* , paragraph 16.

<sup>69</sup> Case C- 279/93 *Schumacker*, paragraphs 21 and 26.

<sup>70</sup> Ståhl, K. Österman, R: EG-skatterätt, p116.



## Cohesion of tax system not accepted

The reason for the refusal of deduction of such a contribution to a pension fund, was that when the fund was to be dispersed it would be liable for taxation in the home state of the taxable person, according to a Double Taxation Treaty<sup>71</sup> between the Member States. It would therefore lead to a tax loss for the State allowing a deduction of such a contribution to a non-resident. Therefore the Netherlands appealed for a *need of cohesion* within the tax system, especially considering that the dispersion of the fund was tax free in the source state.<sup>72</sup>

The discussion of the cohesion of the tax system was once again relevant, where the Court referred to *Bachmann* where the idea of *fiscal cohesion* was laid down.<sup>73</sup> In the case of *Bachmann* the Court found the national provisions to be in breach of both Article 39 EC and 49 EC. Thus the discrimination of the freedom of movement of labour as well as service was breached. This was however justified on the grounds of the *need for coherence* in the tax system. The very same justification ground was referred to by the Netherlands in the *Wielockx - case* as well; however the Court did not accept this justification ground there. The reason was that there was no *established connection between the deduction right and the tax liability* for individuals within the State, in the *Wielockx-case*. The inner coherence of the system had instead been a question of reciprocity between the contracting states, since the issue was already subject to legislation under a double taxation treaty.<sup>74</sup> In this Double Taxation Treaty it was established that each Member State had the right to tax all relevant pensions which applied to its residents, regardless of in which Member State the contribution was made. Due to this there was no possibility to call for a need of the Coherence of the tax system.

Court concluded that not allowing relieves for pension funds, even though the workers main part or all of the income receives from the works state, on the basis that there is a need for coherence in the tax system, is not accepted.<sup>75</sup>

## Asscher

The limits of how great part of the income should be obtained from the state of residence was not settled until the *Asscher-case*<sup>76</sup> was ruled down in

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<sup>71</sup> Case C- 80/94 – *Wielockx* , paragraph 8, referring to the Art 18 of the OECDdraft. (Model Double-Taxation Convention on Income and on Capital, report of the Committee on Fiscal Affairs of the OECD, 1977.)

<sup>72</sup> Ståhl, K. Österman, R: EG-skatterätt, p. 130.

<sup>73</sup> Case C-204/90 *Bachmann*, paragraph 23.

<sup>74</sup> Ståhl, K. Österman, R: EG-skatterätt, p. 130.

<sup>75</sup> Case C- 80/94 *Wielockx*, ruling by the Court.

<sup>76</sup> Case C- 107/94 *Asscher* [1996] ECR I -3089.

1996. It was not mentioned any percentage limit in *Schumacker*, only that a larger part of his income should originate from the State of the employment.

The *Asscher-case* concerned similar provisions as were essential in *Schumacker*, however regarding Netherland's tax law. In the case the plaintiff did not receive at least 90% of his worldwide income from the state of employment and it was not until after the judgement was ruled down, that it can be argued "that a strict 90% limit is in any case a violation of the fundamental freedoms enshrined in the EC Treaty"<sup>77</sup>

## **Gschwind**

In the *Gschwind-case*<sup>78</sup>, from 1999, the arguments and reasoning in the Judgement from the ECJ focused merely on *Schumacker* and *Wielockx*.<sup>79</sup> The question, was merely about whether Article 39 EC<sup>80</sup> "precluded the application of a Member States legislation which granted resident married couples favourable tax treatment" however at the same time made the same treatment of non-resident married couple as in the conditions described in the case.

The circumstances in the case were that one spouse was working in Germany whilst the other was working in their State of residence. Despite that one of them, worked in Germany they could not together reach the limit set up, which was to have at least 90% of the family income liable to tax in Germany. The double taxation treaty which was applicable stated that the German income would be exempt from taxation in the home state. (In other words the husband was not at all due to taxation in his home state!) On the grounds that a great part of the income of the family originated from their home state, the State in question was liable to take into account the personal circumstances according to the provisions set up in the home state.

## **Judgement of the Court**

In its judgement, ECJ stated that discrimination can only arise when national rules lead to the "*application of different rules to comparable situations, or the application of the same rule to different situations.*"<sup>81</sup> In this case the *ECJ did not see the situation*, of only one spouse working in Germany and the other working in the home state, *comparable* to a situation where both individuals of the family where working in Germany, even though both families were living away from their home state. Thus it were in principle allowed to apply national rules which led to that non-resident

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<sup>77</sup> Toifl, G; Chapter 6 in: EC Fundamental freedoms and Non-Discrimination Provisions in Tax treaties, p.151-152.

<sup>78</sup> Case C- 391/97 Gschwind.

<sup>79</sup> Article on the Gschwind decision by Newey R; German tax law not discriminatory for non-resident married couples European Taxation, 2000.

<sup>80</sup> At the time ART 48 (2) EC.

<sup>81</sup> Article" Gschwind decision: German tax law not discriminatory for non-resident married couples, Newey Robert, European Taxation, 2000, Vol. 40, Issue3, p 115 , se also Case C- 279/93 Schumacker.

workers employed in the Member State were taxed more heavily than resident workers domestically employed.

On that basis the Court found that it was having a national provision which were treating resident spouses one way, while the same treatment for non-resident spouses was depending on the condition that at least 90 % of their total income must be subject to tax in the Member State. In this context it was also stated that the when considering the percentage rate of their income, is overseen, the circumstances for the spouses shall be taken into consideration mutually, and not on an individual basis.

### **Further cases**

Further cases where for example the non-resident worker gained access to the Basic relief<sup>82</sup> available for deduction in the working state are for example *Wallentin* and *Gerritse*<sup>83</sup>. In these cases the relief was allowed as a personal relief as the entire personal circumstances were taken into account.

## **4.3 Evaluation**

In the first few decades of aspiring and tentative approaches towards how the Community law approach should be specified, the ECJ produced many uncertain judgements. When the “Rule of reason-test” came about, the grounds for justification blossomed, where the argument of fiscal cohesion seemed to be the most empowering<sup>84</sup>

### **Cohesion arguments not accepted**

In *Schumacker* the argument for cohesion was that there was a link between the taking into account of the personal circumstances and the right to tax worldwide income. Enabling the non-resident state to take such criteria into account would thus lead to the circumstances being taken into account twice. This argument for justifying the cohesion of the tax system was however not accepted by the Court, which instead crossed over to a discussion of residency and found that benefit related to income must be given equally to non-resident and to residents.

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<sup>82</sup> The Swedish basic tax relief, (grundavdrag), and the German equivalence, which safeguards a personal existence minimum rate.

<sup>83</sup> Case C- 169/03 *Wallentin*, REG 2004 I-6443, and Case C- *Gerritse*, REG 2003 I-5933.

<sup>84</sup> Vanistendael, Fiscal cohesion- the phoenix rises from his ashes.

## Residency criteria and comparable situations

Further cases which elaborated on the criteria of residency was, where the fall point was that the tax earned in the non-resident country (Germany) only constituted *a part* of the worker's (Mrs. Gilly's total income), compared to *Schumacker* where more than 90% of his total income came from the country where he was non resident! On these ground Mr. Schumacker was entitled to having German tax authorities take his personal circumstances into consideration, while Gilly was not.

There seems to be a presumption that situations are equal, and that so shall be the case until one can show a circumstance which breaks the presumption. The comparability is based on how the tax provisions are constituted, and not on the actual practical situation, which applies to the subject in the case.<sup>85</sup> For most cases, and tax provisions, which have come under the trial of the ECJ, the conclusion has been that the situation of residents and non-residents can be compared, and thus the negative differentiation of non-resident workers is discriminatory.<sup>86</sup>

In the *Gschwindt* -case the Court found the situation of one of the couples working in the home state *not comparable* to a situation where both spouses were working in the non-resident state, and thus there was no discrimination at hand. The question was therefore more depending upon *how great part* of the total income was liable to tax in the non-resident state. If this was found to be above 90% of the income, the benefits in the non-resident state were applicable in the same way as for resident workers.

## Choice of law

The Court seems to weigh between using the international law of taxation and the Community Law, rather than putting the latter ahead of the other. When there are cases where no open discrimination is at hand, its is more difficult to forecast whether there was a breach to the Community Law or not. There has been a tendency to strive for balance between a respect needed for the integration and a functioning common market on one hand, and the desire of the Member States to protect their tax sovereignty from being hollowed out as well as maintaining cohesion within their tax systems on the other hand.<sup>87</sup> This is particularly clear in the judgement of the ECJ in the *Gschwindt*-case.<sup>88</sup>

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<sup>85</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 115.

<sup>86</sup> Ibid.

<sup>87</sup> This point of view is partly deriving from: Ståhl, K; EG-skatterätt, p.136, section 1.

<sup>88</sup> Case C- 391/97 Gschwind, paragraph 24.

When it comes to the free movement of workers, the concept aims to include workers as employees. When a case concerns self-employed persons or those with own companies it is instead the article regarding free establishment which technically is applicable.<sup>89</sup> No matter which article is used, ART 39 or the freedom of establishment rules, the free movement of the physical individual is preserved in the same way. Which one of the Treaty freedoms is applied, is on the whole lacking relevance since the ECJ has interpreted the treaty articles on freedoms of movement in the same manner when it comes to physicals.<sup>90</sup>

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<sup>89</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 115.

<sup>90</sup> Case C-107/94 Asscher [1996], ECR I -3089, paragraph 29.

# 5 Union citizenship - evolving the concept of freedom of movement

The Concept of Union Citizenship was introduced into the Maastrich Treaty in 1993, by the inclusion of ART 8 EC (previously ART 17-18 EC). This concept has further brought a widening of the freedoms of movement since one more rule can be applied besides the free movement.

## Grzelczyk

In the *Grzelczyk -case*<sup>91</sup> it was the differentiation based on *nationality* that was on trial. The Court came to the conclusion that ART 6 EC now makes sure that even non nationals of a state are entitled to a non-contributory social benefit the same way that a national would be. ART 6 EC, and 8 EC precludes the entitlement to this benefit made conditional on the applicant falling within the scope of Regulation 1612/18 of the Council of 15 October 1968 of freedom of movement of workers, when the same criteria does not apply for the national. Thus ART 6 EC and ART 8 EC, further contributed to removal of discrimination based on nationality. The discrimination based on nationality can be said to be eliminated.

## Schempp

In *Schempp*<sup>92</sup> it was stated that the EC treaty provides no guarantee for a citizens changing his residency to be tax-neutral on grounds of the freedoms of movement. The negative tax consequences in case of Schempp arose due to differences between the tax provisions of the Member States and were thus not such a restriction of the freedoms of movement in the Treaty. However, the importance of Schempp is that the judgement ruled down in 2005 brought about a *general right to free movement for those who are Union Citizens*. Thus, the concept of Union Citizenship formally was applied. The general restriction of discrimination, along with ART 8a EC, means that the also the one who moves his settlement, becoming resident in another member state, is protected against any negative treatment from taxation point of view, which originate from the changes in place of settlement.<sup>93</sup> Every citizen of the Union is now free to move and reside freely within the Union.

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<sup>91</sup> Case C -184 /99 Grzelczyk, (2001) ECR I-6193.

<sup>92</sup> Case C-403/03 Schempp, [2005] ECR I-6421.

<sup>93</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 93.

## 5.1 Analysis - consequences of an expanded Union Citizenship

The right of movement in property of *worker* have been more and more impoverished through the concept of Union Citizenship.<sup>94</sup> The concept of free movement of persons has evolved to Union Citizenship, which has taken over the role as securing the freedoms for the individual in the EC, which literally means the European Union as a geographical area. The development and the concept of the Union Citizenship have been worked up more in detail by other authors.<sup>95</sup> I find however this to be of great importance also in a fiscal context, which is the aim of this paper, since the application of the “Citizenship” into case law, and all rights which are ensued by it, is affecting Member States fiscally.

The notion of citizenship has furthestmost been confirmed through the *Schempp-Case*.<sup>96</sup> When ART 8 EC is read together with the general prohibition of discrimination of ART 12 EC, the status as a *worker* has been shown to have less and less importance, since it means that an individual changing its place of residence to another member state is protected from any negative treatment in taxation which is caused by movement.<sup>97</sup> Which one of the treaty provisions on free movement (freedom of movement of workers, or free establishment) is used has seemed to loose importance due to the concept of Union Citizenship being brought into the Community law.<sup>98</sup> I see this as a fair and practical application of the freedoms stated in the Treaty. The application of the specific rules is more matter of technicality and dividing the case law into the right box, where the fundamental core concept is the free inner market, in the European Community.

I believe the widening of the applications of treaty freedoms is necessary for not making these basic principles toothless. In that regard, I agree with Advocate General Lenz who concerning the *Flynn-Case*<sup>99</sup> more than a decade ago put forward that only a broad interpretation can do justice to the fundamental importance of the prohibition of discrimination on grounds of nationality in the system of community law.<sup>100</sup> The rulings in matter of tax cases have however not been easy since the ECJ strives to avoid acting as a

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<sup>94</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 93.

<sup>95</sup> See further O’Leary, Siofra; The evolving concept of Community citizenship: from the free movement of persons to Union Citizenship, Kluwer, London, 1996.

<sup>96</sup> Case C-403/03 Schempp.[2005] ECR I-6421.

<sup>97</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 93.

<sup>98</sup> Ibid, p. 92.

<sup>99</sup> Opinion of adv General Lenz on Case C- 237/94 O’Flynn [1996] ECR I-2617, paragraph 26.

<sup>100</sup> See also O’Leary, The principle of Equal Treatment n the grounds of nationality in ART 6 EC..., p. 105, 1997.

dictator of political policies as well as it may not condemn any tax system through its judgement.

### 5.1.1 Freedom and security for the individual

In some way it is the Membership of the Community which carries most weight, not the nationality. The actual residency is getting more weight as that is the objective fact, to consider in a persons life. Thus the nationality has lost its power as grounds for differentiations Cases as Collins has as well as doctrine has pinpointed that residential “rights” to social benefits are earned over time<sup>101</sup>, however there is no need to prove economic independency, which was a requirement earlier, when moving into a Member State.

#### **Sehrer and Turpeinen**

A case which also deserves to be mentioned, if not other than briefly, in the context of claiming social security such as for example pensions with reference to the EC Treaty, is the *Sehrer - case*,<sup>102</sup> from 2000. In the case it was highlighted that retired persons who earlier had used their right to move freely within the European Community still obtain their rights to call upon the provision stated in the Treaty. This is the case even if their rights are connected to their previous employment, such as pensions.<sup>103</sup> Thus there is no limit to when the rights of the freedoms in the treaty may be called upon, a fact which strengthens the meaning of the provision in the Treaty.

A case which also deals with income taxation and the old age pension is the *Turpeinen-case*.<sup>104</sup> The case is interesting from the point of view that it further deals with taxation of income in form of old age pension, and the interpretation of Article 18 and 39 EC, where the person liable to tax has changed its place of residence. Sehrer is summed up in Turpeinen, empowering the freedoms of movement. Paragraph 15 states that”. *National provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned*”.

As I see, this strengthens the freedom of movement of workers even more, since the freedoms and all their positive attributes does not only apply to the active worker forces, however also to the one who returned to their Member States in search of work.

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<sup>101</sup> Conlucions of Davies, p. 56.

<sup>102</sup> Case C-302/98 Sehrer, 15 june 2000.

<sup>103</sup> Case C-302/98 Sehrer

<sup>104</sup> Request of 20.12.2004 [C-520/04](#) - Turpeinen



Thus, the freedom of movement of physical individuals within the EC, have expanded to nowadays also comprise the freedom of establishment, the freedom of movement of workers as well as Union Citizens!

As regarding which one of the Treaty provisions: (the freedom of establishment, free movement of workers or the provision concerning Union Citizens) , is most accurate to be apply in each case, it seems to be of less importance since the outcome tends to be the same either way.<sup>105</sup>

### 5.1.2 Financial burden for Member states? – the flip side of the fiscal coin of freedom

With the right to move and reside comes the side aspect of the correctness or defendability of getting not only the same treatment in regards of taxation, however also on matter of social advantages.

#### 5.1.2.1 Jobseekers rights vs. obligations

The original EC Treaty did not provide any rights of free movement and residence for job-seekers. As O'Leary writes in a paper 1997<sup>106</sup>, the ECJ has played “a pivotal role” on expanding the concept of movement of workers in such manner that they must be regarded as more than merely “market citizens”<sup>107</sup> This was at the time discussed with criticism due to the fact that it puts pressure on the application of the Treaty and leaves less space for the Nations to claim its rights, independently of the exercise of an economic activity.

In the case called *Antonissen*<sup>108</sup> it was for the first time the Court brought the thought of a wider scope of ART 39 (at the time ART 48 EC) on the agenda. The case was about Mr. Antonissen who arrived in UK 1984 and after 3 years still was unemployed. After being convicted in march<sup>109</sup> the member state decided to deport him in November the same year, where after his case came to the Courts attention after appellation.

In this case the Court stated that ART 39(3) included a list on non-exhaustive right which are EU citizens have in relation to the free movement of workers, where the right of movement in search of employment was included. The Court argued that leaving the jobseekers outside the safeguarded freedoms of the Treaty, would make the ART 39 EC ineffective. It did emphasise that it acted due to lack of other legislation on

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<sup>105</sup> Ståhl, K; Persson-Österman, R: EG-skatterätt, p. 93.

<sup>106</sup> With reference to Moor: ”Article 7 of the Treaty of Rome Bites”, 1985, p. 458.

<sup>107</sup> O'Leary, Siofra; `The principle of Equal treatment on the grounds of nationality in ART 6 EC in, Dashwood, Alan; O'Leary, Siofra: (ed's) *The Principle of equal treatment in EC law*, Sweet and Maxwell, London,1997. (hereafter O'Leary), p. 110.

<sup>108</sup> Case C – 292/89 Antonissen, [1991], ECR I- 745.

<sup>109</sup> The reason being unlawful possession of cocaine and possession with intent to supply, for which he was judged to 2 terms of imprisonment.

Community level<sup>110</sup>, and comforted Member States that they retained the power to deport a job-seeker who had not found work after a period of time. The time limit set: was to be “a reasonable time”, which clearly makes the Antonissen formula hazy. The court passively agreed to the proposal of UK, which in the case was stated that 6 months may elapse, until the Member State may require a national to leave, if he cannot show that he is continuing to seek, and has genuine chances of being engaged.

The problem with the indistinctness of the Court regarding what is “reasonable” is that member states may consider reasonable time differently. Furthermore, they might also interpret the criteria of encountering employment “in the line of the workers qualifications” differently. The question was thereafter latent, for some time and has recently reappeared in a case which deals the question of work seekers rights in similar manner. This was the *Collins* –case, which dealt with work seekers right to move and reside freely (and furthermore the right to obtain social benefits!)

In the *Collins- case*<sup>111</sup> the ECJ came to the conclusion that Citizens have a right to obtain social advantages, in the form of a work seekers fee, in the same extent as a national, only by being actually *resident* and by proving the mere fact that one is *searching for employment* within the nation and has *reasonable chances* of getting employment. With this judgement, the ECJ opened up and further facilitated movement and applying non-discrimination to job-seekers in its full scope. It was through the Union Citizenship that the earlier concept of an economic, rather than social membership, which had been underlying the Maastricht-paradigm, was opened up.<sup>112</sup> This brought that there should not only be freedom of entry in the economical aspect, however the freedom of movement within the EC also should include a social perspective. Social right tends to grow on you was the conclusion in *Collins*.<sup>113</sup>

On the contrary, to what is mostly common; to discuss the individuals *rights*, it might also be interesting to reflect upon what is proportionate and reasonable to consider as *obligations* for the individual, when in search of work or changing place of residence. Is it reasonable to set up a time limit, such as the one in *Collins*, for finding in the jobseekers host-state? Or is are these rules way to kind and an invitation for abuse, due to the strive expanding the concept of free movement. The lack of implementing the obligations of the individual, into the equation, might lead to unreasonable burdens for their State of residence, which is further discussed below.

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<sup>110</sup> The Council had just about adopted Regulation 1612/68 and Directive 68/360 which ensured Member State Nationals the right of three months duration in search for work. These provisions were however neither confirmed nor rejected by the ECJ in Antonissen.

<sup>111</sup> Case C-133/02 *Collins*.

<sup>112</sup> Golyner, *Jobseekers rights in the European Union: challenges of changing the paradigm of social solidarity*, p 112, 2005.

<sup>113</sup> Davies, *Any place I hang my Hat?* (p-55-56) , *European Law Journal*, vol.11, 2005.

### 5.1.2.2 Reasonable fiscal burden?

The widening/ expanding of the scope of the Treaty freedoms as well as the Union Citizenship, opens up for further discussion to whether it is reasonable by the ECJ to put such financial burden upon each member state. Since it is up to the sovereignty of each Member State to decide the allocation and redistribution of financial resources gathered through taxation, it might be discussed that this widening of the worker concept creates a financial burden, which Member States might be reluctant to take.

There are good arguments claiming that there might be a imbalanced/unfair load for certain Member States, which have to support migrant job-seekers, from a social point of view as well as with the work-seekers fee, by governmental fiscal funds which these workers don't have contributed to in any way. However it seems inarguable to label all nationals who drift in and out of employment as "benefit tourists and scroungers."<sup>114</sup> Especially considering the changing nature of employment market and contract, it is most likely needed for the "Court and Community legislators to accept the irregular patterns of employment"<sup>115</sup> and include them into ART 39, to be able to guarantee the Fundamental freedoms in the Community.

The downside is that there is a risk that nationals use the freedoms and its generous applications to leach on member states public funds, as part time workers, or job-seekers á la *Kempf*.<sup>116</sup> Thus there is seemingly a need to take the individuals obligations into the equation, to a greater extent that has been done at the moment. Unfortunately, this paper has no room for further pondering on this matter.

However offending the situation of possible abusers, such as *Kempf*, might appear to be, there are always measures to take on national level to control and circumvent abuse of a fund or tax system. Thus it is my opinion that, the discussion of the obligations of the individual should be increased, however seeing the situation from a greater angle of approach, it is crucial to protect the fundamental freedoms of movement in the Community. It is in the end these Freedoms that contribute to more positive aspects in form of market stimulation.

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<sup>114</sup> O'Leary , p.116 with reference to Mr. Peter Lilleys according to which a phrasebook translates the words "*benefit tourists*" as including the following words: "Je suis un citoyen de l'Europe", which in his view means: "Give me benefits or I'll take you to the European Court."

<sup>115</sup> O'Leary , p 116.

<sup>116</sup> Case C- 139/85 *Kempf*, [1986] ECR 1741, where the applicant supplemented his income, which was below minimum the of exists on the Host State, with public funds.

Considering what I mentioned above, it is not reasonable to argue on nationality any longer, for grounds of differentiation, and it would be acceptable and logical having residency acting as a legitimate argument. Further should the strivings of the individual, to belong in the State, be given greater weight. (With that I refer to the criterion of actively searching work, in order to obtain a job-seekers fee.)

In that I agree with Davies, who concludes “A community will be defined by its current members more than its history, will be constantly reinventing itself and changing, belonging to those who *participate*, not those selected at birth”... “Ultimately nationality will be a meaningless concept, except insofar it is a new kind of nationality, based on membership and participation.”<sup>117</sup>

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<sup>117</sup> Davies, G; Any place I hang my hat? Or Residence is the new Nationality?, p. 56, European Law Journal, 2005.

# 6 Member States obligations to follow Community Law

## 6.1 Explicit and implicit obligations to follow Treaty provisions

To what extent must the Member States follow EC Law in regards of the content of their national provisions? The membership of a Nation in the EC automatically brings along obligations to which the Member State must act accordingly.

Such commitment follows for example by the *principle of loyalty*. Further ART 5 EC states that a Member State is obliged to take *all appropriate measures* to, whether general or in particular, to make sure that it has fulfilled the obligations that follow from Community law.

### 6.1.1 Codes of conduct

While ART 5 EC, as primary Community Law, is directly applicable for all Member States, there are other more diffuse guiding principles which have as purpose to guide Member States in their co-existence in the EC. In 1997 the Council adopted a resolution containing a so-called “*code of conduct*”<sup>118</sup>, which aims to avoid harmful tax competition when designing company taxation provisions. The document is not legally binding and is merely an expression of the States’ joint wills. Thus, being merely a political manifesto, I believe it lies close to interpret this resolution also to be teleologically applicable in regards of the area of movement of the workforce. I assume this mostly based on the aim of the resolution, which is to “*contribute to that the tax systems develop in such way which promotes employment.*”<sup>119</sup>

Thus there is a need, both explicit and implicit, for the Member States to strive and weld their tax provisions in a way which promotes ideal conditions for the free economic “inner market” of the Community. (Regarding the impact of the Treaty freedoms on Tax Treaties I recommend Lang<sup>120</sup> as further reading)

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<sup>118</sup> Resolution of the Council of 1 Dec 1997, on a code of conduct for business taxation. (Council press release 12671/97.)

<sup>119</sup> Pelin, L; Internationell skatterätt, Mediatryck, Lund 3 ed., 2004, p. 248.

<sup>120</sup> Lang, M; ‘The Binding Effect of the EC Fundamental Freedoms on Tax Treaties’ in Gassnaer, Wolfgang; Lang, M; Lechner, E; (ed.s) *Tax Treaties and EC Law*, Kluwer, Netherlands, 2001, pp. 15-32.

However, when it all comes down to it, there are no provisions arising from Community law which states or deduct from the powers of a Member State regarding the area of taxation<sup>121</sup>. The ECJ has clearly stated that Community law does not infringe the Member States right to organise their taxation systems.<sup>122</sup> What is further important to bear in mind is that the Court in its judgement does not condemn any national provisions; it does not have such power. It merely gives more detailed interpretation of the aim of the EC Treaty Law, and what effect it was meant to have. It is then up to each national Court to decide if the national provision at hand constitutes a breach of the Treaty freedoms and should or shouldn't be applied in a case. The interesting interpretations of Treaty Law appear when a national legislative system does not satisfyingly apply the national provisions in accordance with Treaty Law (in this case the Treaty Freedoms), and cases are referred to the ECJ for interpretation.

### 6.1.2 Treaty Interpretation by the ECJ

The ECJ has the outermost right to interpret the Treaty Law according to ART 230 EC. Such trials may be pursued after invokings by Members States, or by the national court, when all other the internal national remedies have been exhausted. A reason for tax-matters not entering into discussion until recently is that it takes time for a case to exhaust all legal remedies available, and thereafter be passed on to the ECJ for interpretation.<sup>123</sup> A somewhat faster approach is to request a *Preliminary deciding* (ART 234 EC) from the ECJ, regarding an interpretation of Treaty Law, so that the national courts easier can decide on the likeliness of whether a certain provision will or wont infringe on Treaty Law. There might however be a reluctance from national courts to do this, since it de facto means that they question the applicability and strength of their own national legislation. This phenomenon might thus lead to fewer cases being referred to the ECJ, than what there might actually be opportunity for.

### 6.1.3 Relevant Case Law

#### **Van Munster Case**

What is interesting to highlight in the *Van Munster-case* is that the Court did not in fact reason around the technicality of the provisions in the Case, regarding if there was a breach or justification of the Treaty and in what

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<sup>121</sup> However, the Court in Schumacker has indicated that the interpretation of Article 48 EC, for one, may give justification to limit the right of a Member State to put up provisions concerning the liability to taxation liability which lies on a non-resident national of another Member State.

<sup>122</sup> Case C- 165/91 Van Munster, [1994], ECR I-4661. paragraph 35.

<sup>123</sup> Report on research findings represented on a conference at the Department of Business law, University of Lund: Brokelind, C; Kanter, M; 'The effects of ECJ's Case Law in direct tax cases: Swedish report' in: "*The effects of ECJ's rulings on member state's direct tax law*", Lund 2006, preliminary draft p.175- 207, (at p. 176.)

aspect, nor give any real clue on how to solve the issue at hand. Thus it led to somewhat confusion, when the Court was not able to solve the problem. The Court merely called upon cooperation between the Member States in light of Article 5 EC (nowadays Article 10 EC), *thereby asking the States to solve the problem themselves!*<sup>124</sup> It was by that up to the national Courts to interpret and apply the rules in such manner that they would be compatible with the Community law. The reason for the Court not being able to solve the issue was that it was not able to solve the problem within the frame of coordination rules, as it may not harmonize national law. The problematic with this lack of guidance from the ECJ is that national Courts are mostly reluctant towards interpreting national law and reaching the decision that their national law is not applicable due to it constitutes a breach of the Community law. This is especially a difficult task to demand of a national Court, if there is no specific case-law from the ECJ, “which obliges the state to do so”.<sup>125</sup>

### **Engelbrecht-case**

Judgement of the *Engelbrecht-Case* which was published by the Court on the 26th of September 2000, where it can be said that the ECJ was asked to explain its judgement in the previous *Van Munster-Case*.<sup>126</sup> Thus the two cases resemble each other.

As conclusion, the Court came to the fact that it cannot be considered that Community Law affects the right of a Member State to define their social security system. It is however a fact that the aim of Article 42 EC would not be met, if migrant workers lose their social security benefits given them by national law, due to the fact that they exercise their right to free movement. Thus there is a need for the national court to apply their provisions in such way with is in accordance with the Community Law.

If there is a need to, the national Court should set aside the national law, which brings a breach of the Common Law. The Community Law may be breached if the employee loses a social advantage or gets a reduced, because the pension of his spouse is taken into account.

### **6.1.4 Evaluation**

As Community law stands present, the direct taxation does not fall within scope of the Community’s purview, however there is nevertheless an inevitable obligation for the Member States, which must exercise their powers in consistency with EC Law.<sup>127</sup> Thus, accordingly, for national

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<sup>124</sup> Case C- 262/97 *Engelbrecht* , see also comments on the case in: Pennings, F; The *Engelbrecht* Judgement, *European Journal of Social Security*, p. 283, paragraph 4-7.

<sup>125</sup> Case C - 262/97 *Engelbrecht* [2000] paragraph. 6.

<sup>126</sup> Case C- 165/91 *Van Munster*, [1994], ECR I-4661.

<sup>127</sup> Case C-246/89 *Commission vs. UK*, [1991] ECR I-4585, Judgement, paragraph. 12.

provisions to be in line with EC Law ART 39 requires more precisely that Member States abolish “any discrimination based on nationality between workers of the Member States...”<sup>128</sup>

When it comes down to the *Van Munster* and *Engelbrecht-Case*, the Court firstly put up a cryptic judgement with reference to co-operation between Member States in light of Article 10 EC (at the time Article 5 EC), without really giving a solution to the problem at hand. The meaning of this judgement was however more specified, when the Court in the latter *Engelbrecht –Case* came to its conclusion. The Court stated that if there is a need to, the national Court should disregard from those provisions which lead to a breach of Community Law. Thus there is a clear obligation for Member States, to follow EC law in national tax law rules! In this paper I find it satisfactory only to state that there exists an obligation, both explicit and implicit, to follow the Community Law and the EC Treaty. For those who are further interested more in detail about the legal consequences of an infringement of the Treaty or EC Law I refer to further to doctrine dealing with Tax Treaties, where authors like Toifl<sup>129</sup> have investigated this topic in depth.

## 6.2 Sweden’s obligations towards its Membership and EC Law

To what extent are the Legal authorities in Sweden obliged to follow and interpret national law in accordance with the amended Treaties or with Community Law as a consequence of Swedish membership? Two different situations might arise, the first when a treaty has been agreed upon however is in breach, or if the treaty has failed to be incorporated, may it be due to time consuming legislative bureaucracy or other reasons causing delaying, the consequence is that the treaty provisions is not applicable according to the national law. Basically, there exists no obligation to interpret a domestic provision in conformity with the tax treaty provision.<sup>130</sup> The obligation member states have though is to make sure their national provisions do not infringe on the stated freedoms in Community Law. Since EC Law has direct effect, meaning that they are directly applicable. That the free movement provisions in the Treaty have *direct effect* brings along a

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<sup>128</sup> Case Case C-279/93 Schumacker, paragraph 22, and comments in: Broberg, Holst-Christensen, Free movement in the European Union, p. 578.

<sup>129</sup> Toifl, G; `EC Fundamental Freedoms and Non-Discrimination Provisions in Tax Treatie´s in Gassnaer, Wolfgang: Lang, M; Lechner, E; (ed.s) “Tax Treaties and EC Law”, Kluwer, Netherlands, 2001, pp.127 - 165, (at p.161 ff)

<sup>130</sup> Nelson, M; `Tax Treaty Interpretation in Sweden´ in Lang, M; Tax treaty interpretation, Kluwer, Netherlands, 2001, pp. 323 ff.



restriction for the practicing authorities to apply national provisions,<sup>131</sup> which are (clearly) in breach of Treaty Law.

## 6.2.1 Implementation of Community Law in Sweden

In practice there are quite some examples where Swedish legal authorities, such as for example the Tax Authorities<sup>132</sup>, still treat and handle EC law as foreign law. One of the examples of this is the Handbook from the Tax Authorities, on guidelines for taxations of international cases.<sup>133</sup> This indicates a sluggishness in the way EC Law transpires and claims power over national law, since it is still (after 11 years of membership in the EU) is being treated as “foreign” and since Authorities do not interpret domestic law in accordance with Primary or Secondary EC Law.<sup>134</sup>

Since Sweden joined the EC in 1995 and since it takes a long time for Cases to be revised and since it may take up to five years for a case to end up in Administrative Court<sup>135</sup>, which may further process it onwards to the ECJ there is a lack of case law regarding Swedish tax provision. Further more there are difficulties to rise EC relevant law and provisions in national lower instances, which also leads to fewer trials of Swedish law. The fact that the Swedish Tax Authorities act as kind of a strainer, and sorts out ambiguous tax provisions only contributes to the fact that less provision end up being tried by the ECJ.

## 6.2.2 Trends in Swedish “legal practice” - legal security endangered?

Since the Treaty Law has direct effect there is an obligation for the national Courts in the Member States as well as the practical legal authorities<sup>136</sup> to not apply any laws, or provisions which might infringe EC Law. In Sweden this is followed by the Tax Authorities (Skatteverket, hereafter called “SV”) introducing “*styr signaler*”, so called “*Steering-signals*”<sup>137</sup>, where the Tax Authority takes sides and show their attitude towards ambiguous cases, which they believe are infringing EC Law. The ambiguous rules are on basis of these signals not applied at all. This independent acting of the SV means that they, in a way, undermine and take over the role of the legislative apparatus, as the single-handedly cross out part of Swedish law, and thus in

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<sup>131</sup> Ståhl, K; Skatterna och den fria rörligheten inom EU-svensk skatterätt i förändring?, Ny Juridik, 4:06, VJS, Stockholm, 2006 p 28. (hereafter: Skatterna och den fria rörligheten.)

<sup>132</sup> Skatteverket, SV.

<sup>133</sup> Skattverkets Handbok för internationell beskattning, 2006.

<sup>134</sup> Report on research findings represented on a conference at the Department of Business law, University of Lund: Brokelind, C; Kanter, M; ‘The effects of ECJ’s Case Law in direct tax cases: Swedish report’ in: “The effects of ECJ’s rulings on member state’s direct tax law”, Lund 2006, preliminary draft pp.175- 207, (at p. 175.)

<sup>135</sup> Ibid, p. 176.

<sup>136</sup> Ståhl, K; Skatterna och den fria rörligheten, p. 28.

<sup>137</sup> Authors own translation, see also [www.skatteverket.se](http://www.skatteverket.se) (official home page of the Swedish Tax Authority)

practice<sup>138</sup> create the valid law., since the rules thus no longer are in use, even though they have not been officially and lawfully declared void.<sup>139</sup>

Critics<sup>140</sup> claim that there is a danger of single-handedly voiding out rules in this manner since this is done in accordance in a hardly transparent order. This undermines the fundamental legislative process that is needed for predictability and legal security. In doing so the SV inevitably goes against one of the most fundamental principles, in Swedish national Law as well as in EC Law, which is the principle of legal security and certainty.<sup>141</sup> Pålsson<sup>142</sup> is one of those who puts forward critique towards the way the Swedish taxation authority acts, when setting up and applying (or in this sense –not applying) certain provisions in national law. Ståhl agrees with his opinion.<sup>143</sup>

### **“Holes” in the legislation**

At the same time as the SV takes a risk when not applying provisions on a basis that they might infringe the freedoms in the Treaty (it can turn out that the ECJ is in fact of a different opinion) - it is also saving valuable, time for the ECJ. This because of the fact that the ECJ never have to deal with cases of discrimination arising from national Swedish provisions which are clearly in breach of the freedoms in the Treaty. When it comes down to it, it merely follows its obligations which arise through the Membership in the EU; which is to apply Community Law.

However a further problem is that if the Swedish legislative organs decide on not changing the ambiguous tax provisions at the same time as the taxation authorities decide not to apply the rules in question, a “hole” arises in national law, which leads to uncertainty, which should be avoided in legal matters at all cost. It is however, seemingly the trend right now, according to Ståhl, that the SV seems to have taken upon itself a more and more “creative and legislative” role nowadays.<sup>144</sup>

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<sup>138</sup> Ståhl, K; Skatterna och den fria rörligheten.

<sup>139</sup> Ibid, p. 29.

<sup>140</sup> Wickman, K, Skattjakten- En kritik av skatteharmonisering inom EU., p14, Timbro 1999.

<sup>141</sup> Ståhl, K; Skatterna och den fria rörligheten, p. 48.

<sup>142</sup> Pålsson, R; ”Skatteverkets styrsignaler- en ny blomma i regelrabatten”, SkatteNytt 2006, p 401ff.

<sup>143</sup> Ståhl, K; Skatterna och den fria rörligheten, p. 29.

<sup>144</sup> Ståhl, K; Skatterna och den fria rörligheten, p 32. (authors own translation.)

# 7 Tax-Harmonisation in EC?

## 7.1 Discussion

### 7.1.1 Harmonisation - a favourable solution?

Most scholars seem to be in agreement of that the only way to eliminate all hindrances of movement and obstacles arising from different skatterekvisit is unification within the area of taxation, within the EC. According to Dahlberg it's been more and more clear from the ECJ that unanimous solutions are required to overcome the widespread international taxation problems arising from different tax provision on a national basis.<sup>145</sup>

At present there are extensive inquiries<sup>146</sup> going on, which has the aim to coordinate the national tax systems. One proposal of interest might be mentioned, which is based on the so called "Home state taxation",<sup>147</sup>, where a formula would be used to calculate the taxation. The proposal has the advantage of not requiring any changes in the national tax provisions, which would thus facilitate implementation.

Also according to Vanistendael it seems that true unification can only be reached on a Community level, with cooperation between the states. He is one clearly in favour of a harmonisation between the Member States when it comes to the taxation area on Community level. Harmonisation might however take different forms, but one of the mentioned solutions is that harmonisations should take place in form of a unified definition on the tax subject.<sup>148</sup> Those in favour of the Community argue that the Member States should minimise the fight of their own territoriality and protecting their own sovereignty and see the whole of the Community instead. As Vanistendael puts it, "...Member States cannot have national cake and eat the European one"<sup>149</sup> Harmonisation seems thus be the further most solution for balance, is systematically mentioned when discussing the improvements in European Taxation and the future of Tax law in the Community.

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<sup>145</sup> Dahlberg, Internationell beskattning, p. 211.

<sup>146</sup> The "Ruding report" (1992) and the report on Company taxation (2001), both containing proposals for provisions unification within the area of direct taxation.

<sup>147</sup> Dahlberg, Internationell beskattning, p. 211.

<sup>148</sup> Vanistendael, F; ET Special issue: EU- Fundamental Freedoms for Citizens, Fundamental Restrictions on National Law?, European Taxation1/2, January/February 2000, p. 6.

<sup>149</sup> Vanistendael, editorial for EC Tax review: A window of opportunity of the making of Europe: Member States cannot have national cake and eat the European one", 2003-1.

### 7.1.2 Arguments pro and con harmonisation

The danger if putting harmonisation into force on a Community level is that the counteractions of the public might lead to a failure of implementing taxes due to disagreements on disproportionate tax rates. However, I believe there is no need to fear riots, or such extreme measures from public opposition, since the process of harmonisation is a long and slow, and will guaranteed be debated dry before applied in reality. Even though there in theory exists a risk of the Community loses its head and puts up a "harmonized tax rate" which is much over what is to be considered as above "optimal tax-level"<sup>150</sup>, this is probably not very likely to happen due to the rigorous legislative process which harmonization involves.

The backside of harmonization to the extent of a unified % tax-rate is however that the lack of competition from low tax states to keep the rates down, the market might not be stimulated in the same manner.

If any common tax rate is to be assumed within the EC, critics of EC tax harmonisation<sup>151</sup> claim that this rate is most likely to end up at a higher level, since larger countries like Germany and France have no ways of cutting their fiscal incomes to a lower rate and maintain their social security schemes. These larger states need the fiscal income from the taxes to fund governments and the public and their social security schemes.

The ECJ has generally seen been quite open concerning the freedoms stated in the Treaty, giving the provisions power over a vast area within the taxation area. As Ståhl<sup>152</sup> puts it: *The case law of the ECJ , within the taxation area is (thus in accordance with the very integration-friendly attitude which characterizes the activity/function//programme of the Court.* As member states persistently clings on to their reluctance towards harmonising of the income taxes, the Treaty interpretations of the ECJ gains a more and more importance, giving the Court increasing influence in within this area.<sup>153</sup> It can be said that the ECJ has taken over the legislative role, being almost the only supreme director of the legal development, through the case law,<sup>154</sup> at least in regards of primary interpretations of EC Law.

### 7.1.3 Legitimacy of legislative organs of the Community

In that regard I see it appropriate to briefly reflect over the concept of legitimacy of such Community organs such as the EU Commission. With principles as the predictability and the legal security in mind, it is interesting

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<sup>150</sup> National encyclopaedia, where tax levels are at an optimal equilibrium which is most efficient and supply most public satisfaction.

<sup>151</sup> Wickman, K, Skattjakten- En kritik av skatteharmonisering inom EU., p14, Timbro 1999.

<sup>152</sup> Ståhl, K; Skatterna och den fria rörligheten, p. 8.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

to reflect on who constitutes the Organs of the Community. These people are the ones who create the Court/ the Commission (and the other organs of importance) and deliver the Case law and Regulations which eventually will shape our lives and future! It is interesting to think of how these people, who represent our countries in the European Community, are chosen, since there are important legal (and most likely also political) aspects embedded in their work.

What the Consequences of a Harmonised tax Law within the EC might be, is yet only to elaborate and philosophise upon. The mere fact which seems obvious and no doubt before us, is the fact that the Union seems to be a growing Concept, where the Member States may enjoy the power on being strong however they must at the same time also give into the supremacy of the Community more and more.

## 8 Conclusion

The free movement of labour has always been an important economic aspect for a creating growth and a positive workflow within the Community. Nowadays, as this paper aimed to show, the free movement is not only protected by the freedom for movement of *workers*. Other provisions such as the freedom of establishment and the free movement of Union Citizens tend to cooperate and in ensure the free movement of physical individuals without practical difference.

Case law concerning freedom of movement of workers, has in context of income taxation, shown that there are justification grounds which may excuse national provisions in breach of the Treaty. It was firstly with the “Rule of Reason”-test, a clear definition was given, of conditions that would be acceptable and justify a breach of Treaty Law. The conditions were that the provision should be applicable in a non-discriminator manner, be motivated by reason of public interest, aimed at maintaining the purpose of the provision and lastly be proportional to goals they aim to achieve. One of these justification grounds is the cohesion of the tax system. It has now further been cleared by caselaw from the ECJ that the justification of a breach, needs to have *direct link*, instead of an indirect economic or social link. This development seems positive since it excludes most political appeals as tax-loss or similar arguments, and focuses on the legal context in the situation – the direct link in the situation at hand.

If justification grounds were not applicable for discussion in a certain case, the ECJ based its judgements on factors like the residency criteria and discrimination. In this context, it seems important to sort out the definition of what discrimination is. The hidden and open (overt and covert) discriminations are sometimes, mentioned through out case law and the basic line is that the word discrimination means differentiation of two like situations. Discrimination thus occurs if same cases are treated differently or if different cases are treated the same. It is all implicit that the discrimination implies a negative meaning.

Additionally, there are opinions in doctrine claiming the existence of a third categorisation of the discriminations; which is at hand when situations which *differ very little* are *treated in very different manner*. This is interesting to highlight, especially in relation to the principle of proportionality. As discrimination in this way may vary from place to place, it is interesting to consider what proportions of differentiation we consider reasonable or discriminatory. Opinions in literature, have in this context also stressed the importance of the need for comparison of the correct subjects. In this regard, it is suggested that there should be comparison of a market definition, for example that when deciding on nationality discrimination, relevant groups of people should be compared, otherwise the meaning of comparison would seem pointless.

Nowadays there seems to be an indication of that the ECJ has moved from a discrimination analysis to a “restriction-analysis” where the major difference of the two is that the Court in the latter case would leave out the comparative part of the situation and merely state that the (national tax -) provisions are in breach of the Treaty. With that, the discrimination discussion is left out. In most cases, it is not easy to distinguish between direct and indirect discrimination or if non-discriminatory regulations are relevant. The ECJ has from time to time shown tendencies to avoid classification of the mentioned, which have been called the “barrier approach.”

Even though the treaty freedom aims to ensure free movement of labour and is stated to concern workers, it seems to be of less and less importance to be a worker. The freedom to move and reside seems to have taken priority and the motives of those who change their place of residence are not allowed to be questioned by the State. Residential “rights” to social benefits are also earned over time, and there is no need to prove economic independency, which was a requirement earlier, when moving into a Member State. Neither can job-seekers be denied permission to reside merely based on their unemployment, and the individual has further right to obtain a work-seekers fee, from the Host State, if he can show reasonable chances of getting employed. The case law seems to refer to the individual’s freedom to move and reside freely, in the spirit of Union Citizenship. This expansion of the free movement of workers that is now expanded to comprehend all individuals, might however have a backside, a fiscal consequence which is negative for the Host State. Individuals might become economical burdens for the Host State, if there are no or too vague requirements put up in exchange for freely residing in a Member State. In this regard I see it fit to introduce a discussion concerning the obligations of the individual, and not merely debating the rights.

As I see, the concept of the Union Citizenship strengthens the freedom of movement of workers, as well as work-seekers (and Citizens of the Union as a whole), since the freedoms and all their positive attributes does not only apply to the active worker forces, however also to the one who returned to their Member States in search of work. Thus, the freedom of movement of workers has seemingly expanded to physical individuals within the EC. As regarding which one of the Treaty Freedoms (the freedom of establishment, free movement of workers or the provision concerning Union Citizens), is most accurate to apply in each case of a breach, it seems to be of less importance since the outcome tends to be the same either way.

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