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Summary

The ageing population in Europe has created a demographic shift, especially in the number of pension beneficiaries, which has increased inversely proportional compared to the number of economically active individuals.

With the aim of minimizing future pension problems within the EU Member States, the occupational pension system was proposed by the European Commission to integrate the internal pension market in the EU. However, problems arose when the Member States started to restrict the right to tax relief of contributions paid into occupational pension plan taken out with a pension institution established in another tax jurisdiction.

In order, to create an integrated internal pension market, the European Commission issued a Communication in 2001, entitled “The Elimination of tax obstacles to the cross-border provision of occupational pensions”. However, the exclusive competence in direct taxation of the Member States seems to impede the purpose of the Commission

Therefore, some disputes were brought before the ECJ. The Bachmann Case, where the ECJ accepted the justifications used by Member States, in order to not allow tax reliefs for contributions paid into foreign pension system, opened up a chain of cases where Member States tried to justify the restriction and thus not change their pension taxation system.

Hence the purpose of this thesis is to examine whether the restriction on the right to deduction/exempt contributions paid into occupational or private pension plan taken out with pension institutions established across borders are compatible with the principles of tax law, such as the principles of symmetry, exclusiveness and legal certainty or not. The justifications, such as fiscal coherence, effectiveness of fiscal control and balanced allocation of taxing power, used by the Member States as a defence in the judgments of the ECJ will be analyzed, in order to identify the coherence with the principles mentioned above.

The findings in this thesis will demonstrate that the Member States have a legal basis to modify or not, their pension taxation system and thereby have the right to not allow tax relief of contributions paid to pension plans taken abroad.

Preface

Firstly I would like to thank my supervisor Cecile Brokelind for her help and support when I needed it most. Her availability and friendliness throughout the work of my thesis.

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Abbreviations

AG	Advocate General
Art	Article
Commission	European Commission
EC Treaty	Treaty establishing the European Community
ECJ	European Court of Justice
<i>E.g.</i>	<i>Exempli gratia</i> (Latin for “for example”)
EET	Exempt, exempt, tax
ETT	Exempt, tax, tax
EU	European Union
<i>Ibid</i>	<i>Ibidem</i> (Latin for “the same place”)
<i>I.e.</i>	<i>Id est</i> (Latin for “that is”)
IORP	Institutions for Occupational Retirement Provision
OECD	Organisation for Economic Cooperation and Development
P	Page
PP	Pages
Para	Paragraph
Paras	Paragraphs
PAYG	Pay as you go
TFEU	Treaty of Functioning of the European Union
TTE	Tax, tax, exempt
UK	United Kingdom

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1 Introduction

1.1 Background

The financing of pensions has been a global problem, since in many countries, life expectancy has increased and the birth rates have declined¹. The result of these is that the number of pension beneficiaries has started to be inversely proportional to the number of the economically active individuals. This is especially true in Nordic countries, such as Sweden where the ageing population has doubled in the last 100 years and will continue grow in the coming years². Aware of the economic consequences of the ageing population, The World Bank in 1994, after reports of the economic repercussions of the pension issue, advised that countries should base their pension systems on a multi-pillar model, described as a Three-Pillar Model. Thereafter the “three pillar system” was adhered among Member States in the European Union³. Later on, the World Bank added other two pillars to the model, the non-contributory “zero pillar” and the non-financial ‘fourth pillar’⁴.

The first Pillar is based on the statutory pension scheme⁵. The “second pillar” is called Supplementary or Occupational Pension Schemes, i.e., the employers pay a contribution to pension plan on behalf of their employees, and the “third pillar” is the Private Pension, i.e. the individual pays a contribution and saves for retirement to funded pensions⁶ or pension plan.

Within the European Union, the Member States tax pensions in three different ways, i.e. according to the ETT (Exemption, Tax, Tax), the EET (Exemption, Exemption, Tax) system and the TEE (Tax, Exemption, Exemption). The first component corresponds the funding of a pension fund, which means the contributions. The second component is the tax treatment of the funds and the third one is the disbursement of the pension⁷. In the EET system, the contribution, the investment income and capital gains of the pension institution are exempted and the benefits are taxed. In the ETT system, contributions are exempted and investment income, capital

¹The Yearbook of Nordic Tax Research 2007 (DJOF publishing), p.11.

²Population Ageing - A Threat to the Welfare State? The Case of Sweden, 2010, pp. 7-8.

³The Yearbook of Nordic Tax Research 2007 (DJOF publishing), p.163.

⁴“The Pension Challenge”– Holland Financial Center for Retirement Manager, 2010.

⁵Hanlon, J., “European Law Review. Pension integration in the European Union”, European Law Review, .2004, 29(1), pp.74-93.

⁶he Yearbook of Nordic Tax Research 2007 (DJOF publishing), p.11.

⁷ De Broe, Luc; Neyt Robert (2009). Tax Treatment of Cross-border pensions under the OECD Model and EU Law. Bulletin for the International Taxation, International Bureau of Fiscal Documents, March 2007.

gain of the pension institution and benefits are taxed⁸. In the TEE system, the contribution is taxed, the investment income and capital gains are exempted and the benefits are exempted as well. These three pension taxation regimes are summarized in Table 1⁹.

Table 1. The taxation regimes that can be applied on occupational pension system and whether the taxation is applied or exempted.

	“Payment”	Investment income and capital gains	Benefits Received
EET (Exempt, Exempt, Taxed)	No	No	Yes
ETT (Exempt, Taxed, Taxed)	No	Yes	Yes
TEE (Taxed, Exempt, Exempt)	Yes	No	No

Therefore, the European Union, considering the well-functioning of the single market Union and the fundamental freedoms, brings the problem of the differences in the tax policy within EU Member States, specifically on integration of the pensions systems and starts to influence the pensions¹⁰ policies of the EU Member States.

In 2001, The European Commission issued a Communication entitled “The Elimination of tax obstacles to the cross-border provision of occupational pensions” (second pillar) in order to abolish any tax obstacles to a single market¹¹. This is directly linked to the liberalization of the financial services market, which had not included occupational pension schemes¹².

In 2003, the Pension Fund Directive¹³ on the activities and supervision of institutions for occupational retirement provision (IORPs) was adopted. The main objective of the Directive is to allow pension funds

⁸The taxation of occupational pensions in the European Union. Available at: http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm

⁹ “The Pension Challenge” – Holland Financial Center for Retirement Manager, 2010.

¹⁰Hanlon, J., “European Law Review. Pension integration in the European Union”, European Law Review, 2004, 29(1), pp.74-93.

¹¹The taxation of occupational pensions in the European Union. Available at: http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm

¹²Hanlon, J., “European Law Review. Pension integration in the European Union”, European Law Review, 2004, 29(1), pp.74-93.

¹³Directive 2003/41/EC

to benefit from the Internal Market principles of free movement of capital and free provision of services.

The role of the European Court of Justice (ECJ) in this matter has been important, since its interpretation on the EU law. In the *Bachmann Case*¹⁴, on freedom of movement of workers¹⁵ and freedom of movement of services¹⁶ of the Treaty of the Functioning of the European Union (TFEU), the ECJ held that the restriction on tax deduction for contributions paid to a foreign pension institution was justified by the need to safeguard the cohesion of tax system¹⁷.

However, the ECJ has overturned its decision since ruling on *Bachmann*, regarding the right to the deduction of contributions pension paid into pension plan taken out with pension institution established abroad.

Nevertheless, the Member States still do not grant privileged tax treatment to pension contributions paid to foreign pension institutions unless the latter have established a branch in these countries. The arguments of the governments in their defense, which, will be analyzed later on in Chapter 3, corroborate the foregoing.

In addition, in 2010, the European Commission decided to refer Belgium to the ECJ, since only contributions for pension systems established in Belgium was qualified for tax relief¹⁸.

Although the aim of the Treaty is the establishment of a common market, the infringements against the Treaty Freedoms still occur. Therefore, this thesis will focus on the problems of tax obstacles to the cross-border mobility of pension system based on the interpretation of the decisions of the ECJ, more specifically on the restriction on the deduction for individual and pension fund tax purposes of the contributions paid to a pension institutions established in another Member State.

1.2 Purpose and Problem

According to the background information presented in the previous section, the main concern within the pension scheme is the cross-border tax obstacles, i.e. restriction on the deduction for tax purposes, since

¹⁴Case C-204/90 – ECR 1992, I-00249.

¹⁵Article 45 TFEU "Freedom of movement of workers shall be secured within the Union."

¹⁶Article 56 TFEU "...restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

¹⁷Case C-204/90 – ECR 1992, I-00249.

¹⁸The taxation of occupational pensions in the European Union. Available at: http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/factsheet/2010/11/2010-11-1559-be-tax-personal_en.pdf

contributions paid to a foreign pension institution cannot be deductible nor exempted as domestic contributions.

The first, and the foremost, aim of this thesis is to point out the problems of the tax treatment of the cross-border mobility of pensions within EU Member States, as mentioned above.

The fundamental freedom of movement of services of the TFEU will be considered in this thesis, since it ensures the functioning of the internal market of the EU.

The main analyses will focus on the case law of the ECJ, what the Member States have argued and how the ECJ have decided about the cross-border obstacles to mobility of pension systems.

References and analyses on the Bachmann Case, Wielockx, Safir, Danner, Skandia/Ramstedt, Commission v. Denmark and Commission v. Belgian will be used for this thesis, since they properly bring the issue on the restriction on the deduction for tax purposes of the contributions paid to a pension institutions established in another Member State. These cases will be discussed in order to highlight the problem of tax obstacles to the cross-border provision of pensions¹⁹.

The investigation and analyses will also form the arguments put forward by the Member States in their defenses²⁰, in regard to the pension provisions that still contravene the freedoms of the Treaty. Most of the justifications of the Member States fall on the fiscal cohesion and the effectiveness of fiscal control.

The purpose of this thesis is to point out, from tax law perspective, why Member States still restrict the right to deduct contributions paid to foreign institutions established in another Member State. Furthermore, this thesis will describe and interpret how the ECJ has dealt with the problem of the cross-border obstacles in the field of the pensions systems and the arguments used by the Member States, as a justifications do not have to include in their nationals pensions rules the right to individual income tax deduction or tax exemption for contributions paid into pension schemes.

1.3 Method and Material

This thesis is based on the legal dogmatic method. Hence, the analysis based upon TFEU, principles of tax law, important case law of the ECJ, the

¹⁹The taxation of occupational pensions in the European Union. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/575&format=HTML&aged=1&language=en&guiLanguage=en>. 15 May 2012.

²⁰Wielockx, Case C-80/94; Safir, Case C-118/96; Danner, Case C-136/00; Skandia, Case C-422/01; Commission v. Belgium, Case C-522/04; Commission v. Denmark, Case C-150/04.

articles and doctrine will be employed. The articles and the work of scholars will also be used, in order to elucidate the issue.

With the aim of an understandable overview of the restriction on the deduction of the contributions paid into a pension scheme taken out with a pension institution established abroad, I will describe and analyze the pension system and its different tax regimes. Then the principles of tax law will be explained in order to demonstrate whether the restriction on the deductibility of the contributions above mentioned is compatible with them or not. Finally the substantially case law of the ECJ will be analyzed in order to assure the compatibility or not of the tax treatment of the pension contributions with the principles of tax law.

1.4 Delimitation

This thesis will consider the cross-border tax treatment of the pension systems, limited to occupational pension and private pension systems, within the case-law of the ECJ. The analysis will also be delimited fundamentally on the freedom of movement of services and workers, since they are two of the pillars of the TFEU, related to the problems of the mobility within the interpretation of the ECJ's decisions.

One might argue that the statutory system (first pillar), which represents state pensions²¹, may very well be related to the occupational and private pension system, but this will not be considered, since the statutory system is a mandatory system organized by the state²², i.e. social security schemes.

Only by way of information, the Fund Pensions Directive only targets the occupational schemes. The Pension Fund Directive will not be subject to the study, since it deals with the supervision of the institutions for occupational retirement provision.

This thesis will not make reference to any Member States' rules on implementation of the Pension Fund Directive, as mentioned above, notwithstanding many EU Member States are under pressure to restructure their pension systems.

The case-law of the ECJ that will be source of the analysis is the Bachmann Case, Wielockx, Safir, Danner, Skandia/Ramstedt, Commission v. Denmark and Commission v. Belgian, since the ECJ have judged on the restriction on the deduction for tax purposes of the contributions paid to a pension institutions established in another Member State.

²¹The Yearbook of Nordic Tax Research 2007 (DJOF publishing), p.163.

²²Brokelind, C., "Workers' Mobility – Social Security Issues and Taxation of Frontier workers – The Case of Pensions", 2012.

1.5 Outline

The remainder of this thesis is organized as follows. Chapter 2 presents the Theoretical Background in which the concepts of pension, contribution, benefits, pension tax regimes, as well as the concept of the occupational and private pension system. To better describe the problem, the tax treatment of pension system, the double taxation/non-taxation, the tax principles and the freedom to provide services are also presented in the subsections of the Chapter 2. Chapter 3 analyses the case law of the ECJ. Chapter 4 analyses and discusses the main problem of the ruling of the ECJ associated with the restriction to tax deduction or tax exemption for contributions paid into pension schemes taken out with pension institution established abroad. The conclusion of this work is presented in Chapter 5.

2 Theoretical Background

The World Bank designed a five-pillar model, which determines the pension system modalities and reform options that should be considered²³. These five pillars²⁴ are described as:

- “zero pillar” is defined as “non-contributory social assistance financed by the state”;
- “first pillar” is mandatory with contributions connected with the wages. It is based on a PAYG grounds;
- “second pillar” is also defined as mandatory that is the occupational pension system with “defined contribution plan with independent investment management”;
- “third pillar” is considered as a voluntary and can have many forms, such as employer sponsored individual savings for retirement;
- “fourth pillar” is defined as an “informal support”, such as family support, social programs and also individual assets .

However, within the European Union the first difficulty came in how to integrate the pension systems within the internal market, since, according to Brokelind, the problem is to ascertain “...how much liberty must be given to organize...²⁵” the statutory pension system or first pillar, which is also the issue on the occupational pension system and in the private pension system. This means that there is, according to Hanlon “an overlap²⁶” between the three systems. To corroborate the aforementioned, the occupational pension system is a supplement to the first pillar pension.

Considering that the academic literature about pension systems, which includes the pension taxation, cross-border mobility and the other issues which involve the topic is scarce and also that the topic itself, according Brokelind “is also confusing²⁷” because of the corresponding concepts used to explain the pension system. Therefore, in order to facilitate the understanding of the subject matter, the conceptualization of the pension, contribution, benefit and the occupational pension schemes is necessary.

²³http://siteresources.worldbank.org/INTPENSIONS/Resources/395443-1121194657824/PRPNoteConcept_Sept2008.pdf

²⁴“The Pension Challenge”– Holland Financial Center for Retirement Manager, 2010.

²⁵Brokelind, C., “Workers’ Mobility – Social Security Issues and Taxation of Frontier workers – The Case of Pensions”, 2012, p.4.

²⁶Hanlon, J., “European Law Review. Pension integration in the European Union”, European Law Review, 2004, 29(1), pp.74-93.

²⁷Brokelind, C., “Workers’ Mobility – Social Security Issues and Taxation of Frontier workers – The Case of Pensions”, 2012, p.3.

In accordance with Brokelind, pension is a “financial compensation²⁸” for completion of the working life, also defined as “benefits” and contribution is defined as payment performed by workers during their working life to a common fund or to a company pension scheme.

Benefits or Retirement Benefits, according to the definition of the Pension Fund Directive²⁹, are the payments paid as a result to achieving, or the expectation to achieving, retirement.

The benefits commonly are made in “the form of payments for life³⁰”, which can also be made “for temporary period or as a lump sum³¹”.

As mentioned before it is also important to identify the concept of the private and occupational pension system. The private pension system is recognised as a supplementary pension scheme and individuals carry out the contract with the services providers, like insurance companies³². According to the Green Paper, the occupational pension schemes is defined as

“A pension plan where access is linked to an employment or professional relationship between the plan member and the entity that sets up the plan (the plan sponsor). Occupational pension schemes may be established by employers or groups of employers (e.g. industry associations) or labour or professional associations, jointly or separately, or by self-employed persons. The scheme may be administered directly by the sponsor or by an independent entity (a pension fund or a financial institution acting as pension provider). In the latter case, the sponsor may still have responsibility for overseeing the operation of the scheme³³”.

According to Prats³⁴, cross-border occupational pensions can be defined as supplementary pension schemes where one characteristic is the trans-nationalism. This characteristic transforms the condition from solely domestic to overseas situation. Therefore, the cross-border element is necessary and will be present when “the payer or the beneficiary of the premiums or contributions³⁵” resides in a Member State other than where

²⁸Brokelind, C., “Workers’ Mobility – Social Security Issues and Taxation of Frontier workers – The Case of Pensions”, 2012, p.3.

²⁹Directive 2003/41/EC, article 6 (d)

³⁰*Ibid.*

³¹*Ibid.*

³²COM (1999) 134 final, Commission Communication towards a single market for supplementary pensions, Results of the consultations on the Green Paper on supplementary pensions in the single market, page. 8.

³³Green Paper – Towards adequate, sustainable and safe European pension systems, 2010, p. 21.

³⁴Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, European Taxation, 2001 (Volume 41), No. 13.

³⁵*Ibid.*

the plan is carried out or, when the insurance company is established in a Member State other than where the residence of the payer or beneficiary. The last situation is when “the beneficiary of the income from the pension³⁶” resides in one Member State and the payments are made or the pension has tax benefits in another Member State³⁷.

Considering the above mentioned concepts, the occupational pensions systems can be established from one of three principles, either ETT (Exemption, Tax, Tax), EET (Exemption, Exemption, Tax) and the TEE (Tax, Exempted, Exempted) at the moment of payment.

In accordance with the first principle, the ETT, the contributions are tax-exempt, the investment income and capital gains of the pension institutions are taxed and the income received in the form of a pension is taxed.

On the contrary, under the EET, the contributions are tax-exempt, the investment income and capital gains of the pension institution are exempted, whilst the future pension income will be taxed³⁸. According to David Williams³⁹, the EET system can be defined as deferral taxation, which means that the contributions and pension fund income will not be taxed, but will be taxed on payments of the pensions, i.e. “...when the pensioner receives the income⁴⁰”.

Regarding the EU Member States, in respect to the taxation of pensions, most of them apply the EET principle, while, until 2007, three of the EU Member States applied the ETT principle, which included Sweden, Denmark and Italy⁴¹. The EET principle is supported by the Commission, since the income pension benefits will suffer a future tax liability, which according to the Commission motivates the citizens to save for their old age⁴². Furthermore, the idea of the Commission supporting the EET principle is also to deal with the possibility of the ageing population that many EU Member States would face in the coming years. According to Schonewille⁴³, some Member States have changed their pension tax systems, as is shown in the Table 2.

³⁶Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13.

³⁷*Ibid.*

³⁸Kok, C., “EC Update”, *European Taxation*, 2001, Volume 41, No. 7.

³⁹Williams, D., “The taxation of cross-border pension provision”, *European Taxation*, 2001 (Volume 41), No. 13.

⁴⁰*Ibid.*

⁴¹Schonewille, P.H. (2011). Belastingen en pensioenen in EU-context. In A.H.H. Bollen-Vandenboorn (Ed.), *Pensioen en de belangrijkste toekomstvoorzieningen* (pp. 211-222). Den Haag: Sdu Uitgevers.

⁴²The taxation of occupational pensions in the European Union. Available at: http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm

⁴³Schonewille, P., “Pan-European pension moves a step nearer.”, *Investment & Pensions Europe*, March 2007.

The table 2⁴⁴ below shows how the Member States have applied the principles above mentioned.

Table 2. Types of pension tax system among EU member states.

Country	EET	ETT	TEE	EEE
Belgium	X			
Bulgaria				X
Czech Republic		X		
Denmark		X		
Germany	X			
Estonia	X			
Greece	X			
Spain	X			
France	X			
Italy		X		
Cyprus		X		
Latvia	X			
Lithuania	X			
Ireland	X			
Luxembourg			X	
Hungary			X	

⁴⁴ Schonewille, P.H. (2011). Belastingen en pensioenen in EU-context. In A.H.H. Bollen-Vandenboorn (Ed.), Pensioen en de belangrijkste toekomstvoorzieningen (pp. 211-222). Den Haag: Sdu Uitgevers.

Malta (no second pillar)				
Netherlands	X			
Austria	X			
Poland			X	
Portugal	X			
Romania	X			
Slovenia	X			
Slovakia	X			
Finland	X			
Sweden		X		
UK	X			

However, many Member States restrict the deduction for pension contributions paid to pension plan in another Member State and this occurs because of the distinction of the Member States' tax treatment of pension schemes.

The European Commission, aware of the problem on tax obstacles on cross-border activities of pension taxation, issued a Communication⁴⁵ with the aim to supervise the tax provisions of Member States in order to assure the observation of the fundamental freedoms of the TFEU. According to De Brabanter⁴⁶, the purpose of the Communication was also to ensure that the domestic rules on the deductibility of pension contributions as well as the deductibility of life assurance contributions paid to a foreign institution are not contrary to the free movement of workers, freedom to provide services, the freedom of establishment and the freedom of capital and payments⁴⁷.

⁴⁵COM(2001), 214, 19 April 2001.

⁴⁶De Brabanter, V., "The Danner Case: elimination of Finnish tax obstacles to the cross-border contributions to voluntary pension schemes", EC Tax Review – 2003-3, pp.167-172.

⁴⁷*Ibid.*

Then, in 2003, the Pension Fund Directive⁴⁸ was issued regarding the activities and supervision of institutions for occupational retirement provision. The Directive was not considered a framework directive, i.e., the difficulty to adjust to market changes was not solved by the Directive (Green Paper on Supplementary pensions). The Green Paper⁴⁹ described that certain issues were not covered by the Directive, such as the vague definition of cross-border activity and tax impediments for cross-border pension institutions, pension plans still being the challenge of the pension market integration. However, according to Meerten and Starink⁵⁰, the Commission in the Green Paper missed the opportunity to reinforce the tax issues, which is the considerable obstacle to an integrated internal market for pensions.

Based on, the above discussion, from an EU law perspective this differentiation in the tax treatment of pensions creates cross-border mobility obstacles which hinder pension institutions or insurance companies to operate and provide service among Member States more difficult, which reflects in the integration of the internal market and also on the fundamental freedoms of the TFEU, either through restrictions or discriminations.

2.1 The Tax Treatment of Contributions to a pension system in a cross-border situation

Regarding direct taxation, which includes pension taxation, the Member States still have the discretion to determine “the tax unity, tax base, tax rate and how to administer, assess, collect and recover tax⁵¹”. Therefore, the Member States enjoy fiscal autonomy, but how they decide to exercise that competence remains subject to Union Law. This is corroborated in the judgments of the ECJ, as “Although direct taxation falls within the competence of the Member States, the latter must nonetheless exercise their competence consistently with Community law⁵²”. However, the Union Law is still not being completely applied in the national taxation systems, in spite of the efforts the European Commission and the ruling of the ECJ.

⁴⁸Directive 2003/41/EC.

⁴⁹Green Paper – Towards adequate, sustainable and safe European pension systems – 2010.

⁵⁰Meerten, Hans van and Starink, B., “Cross-border obstacles and solutions for Pan-European Pensions”, EC Tax Review, 2011/1, pp.30-40.

⁵¹Barnard, C., The substantive Law of the EU, Third Edition, 2010, p.276

⁵²Case C-279/93, Schumacker, para. 21 and frequently reproduced since then (for example, in the judgments of 11 August, 1995, Case C-80/94 Wielockx [1995] ECR I-2493, para. 16, of 27 June (1996).

In order to establish and develop a tax pension system the Member States have to take into account the requirements of the Internal Market and the EU law. However, Member States that have developed their supplementary pension systems have made it their exclusive competence. That means that cross-border pensions have been subject to the application of the domestic rules, “thus creating obstacles to the development of a single supplementary pensions market⁵³”. Moreover, the principle of mutual recognition has not been applied, because of the autonomy of the Member States to legislate their national taxation systems⁵⁴.

According to Prats, the national tax policies of each Member State have an important role in the implementation of better policies with respect to mitigating the tax levied on contributions made, for example, to occupational pension system. The pension policy of a Member State can apply on pension taxation one of the three systems (EET, ETT, TEE). Based on these systems, the national tax policies have two instruments, which, according to Prats, are the “exemption/deduction for the employer of contributions made on behalf of the employee and tax relief granted to the employee...⁵⁵”.

In the EET and ETT systems, the deductions are applied to the employers’ contributions and later, up to a certain amount, is taxed on the employee when the pension benefits is paid. The taxable amount depends on the tax rate applied by each Member State. On the contrary, in the TEE system, the contributions are taxed and then the pension benefits are exempted.

However, the EU law must take into account the tax treatment of the supplementary pension system and the direct link with “the treatment of contributions made to a foreign pension scheme by an enterprise and/or worker⁵⁶”. This differentiation on the treatment of foreign pension institution can conflict with the freedom to provide services.

In her article, Kok corroborates that domestic rules, which make the “deductibility of pension and life assurance contributions⁵⁷” depending on “those contributions being paid to a pension institution established within national territory⁵⁸” are contrary to the Freedoms of the TFEU.

⁵³Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13.

⁵⁴Meerten, Hans van and Starink, B., “Cross-border obstacles and solutions for Pan-European Pensions”, *EC Tax Review*, 2011/1, pp.30-40.

⁵⁵ Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13.

⁵⁶ *Ibid.*

⁵⁷ Kok, C., “EC Update”, *European Taxation*, 2001, Volume 41, No. 7.

⁵⁸ *Ibid.*

2.1.1 Double Taxation and Double Non-Taxation

The TFEU does not bring any rule, which imposes the Member States to adjust their tax systems to the different tax system of the other Member State with the aim of to remove the double taxation resulting from the exercise of the two Member States, relating to their fiscal sovereignty⁵⁹.

In order to eliminate the double taxation, the Member States have the permissibility to allocate tax rights among each other and they can do so by either unilateral or bilateral tax treaties. Moreover, they must apply the tax law principles and the allocation principles grounded on the OECD Model Tax Convention. In any case, the Member States must ensure the abolition of the double taxation, in order with the main objective of the EU law, which is the internal market⁶⁰. Furthermore, the bilateral treaties settled between Member States usually have provisions, which restrict the exercise of tax jurisdiction, in order to maintain the fiscal sovereignty.

The double non-taxation occurs when the taxpayers do not pay taxes at all, i.e. the lack of taxation, and this also can arise because of the different tax systems of two Member States. Specifically in the case of the right to tax pensions it occurs when the pensioner moves from the Member State that applies EET/ETT to a Member State that applies TEE/TEE⁶¹.

The Commission, in 2001, issued the Communication 2001, which also had the purpose to eliminate double taxation.

Considering the systems (EET, ETT and TEE) on pension taxation, the Commission proposes two solutions. The first one is when the contribution is paid in a Member State, which applies TEE system and the beneficiary, will receive the benefits in a Member State, which applies EET system. In this case the Member State which applies the EET may have to alter the national coherence, i.e. exempting the benefits paid to their residents, since the contributions were taxed or not deductible in the other Member State⁶². Consequently, this leads to the implementation of the unilateral measures, in order to avoid double taxation.

The second solution is the addition of particular measures in the bilateral tax treaties. Once again, the Member State which applies the EET system would have to alter the domestic tax coherence when the beneficiary receives the benefits from another contracting Member State, which applies the TEE system⁶³.

⁵⁹ Helminen, 1.7.1., 2010.

⁶⁰ Helminen, 1.7.2, 2010.

⁶¹ De Broe, Luc; Neyt Robert (2009). Tax Treatment of Cross-border pensions under the OECD Model and EU Law. Bulletin for the International Taxation, International Bureau of Fiscal Documents, March 2007.

⁶² Prats, Dr. Francisco Alfredo Garcia, "The tax treatment of cross border pensions from an EC law perspective", European Taxation, 2001 (Volume 41), No. 13, p.25.

⁶³ *Ibid.*

Regarding to double non-taxation, when a Member State applies EET system to a contribution level and the other Member State applies TEE system to pension benefits level, one approach that may solve the non-taxation is to add measure in the tax treaties. Therefore, in this case the recognition of the tax jurisdiction will be the state of source and not to the Member State where the beneficiary resides. According to Prats, in this case “pensions may be taxed by way of a withholding tax or based on progressive rates established under the domestic rules of that state applicable to non-resident taxpayers⁶⁴”.

Another solution, regarding the double non-taxation could be the exit tax. However the ECJ have ruled in *Commission v. Belgium* that a Member State ratifying an exit tax on pensions violates the EC Treaty although bilateral tax treaty concluded by Belgium concede the right to tax such income to another Member State⁶⁵.

2.1.2 Tax Principles

In establishing tax measures of a national tax system, a number of principles must be taken into consideration, in order to create a simple, robust and efficient taxation system.

2.1.2.1 Principle of Symmetry

The principle of symmetry mentions for tax purposes that gains and losses of any source of income may have the identical tax treatment, that is that the benefit are taxable, then the expense do not have to be deductible⁶⁶.

According to Terra & Wattel⁶⁷, the principle of symmetry occurs when the income and losses are “two sides of the same coin⁶⁸” and have to be treated in a symmetrical way in the same tax system.

Relating to, the problem on restrict the rights to deduct the contributions paid to a pension institution established in another Member State, the main issue is if an employer contracted a pension plan with an institution established in a Member State with lower income taxes, this behaviour “could result in manoeuvres by persons seeking to benefit from the most favourable tax system, what can conduct to abuses and “fiscal forum shopping⁶⁹”.

⁶⁴Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13, p.26.

⁶⁵ C-522/04, *Commission v. Belgium*.

⁶⁶Vito T. and Howell H.Z., “Tax Policy for Emerging Markets - Developing Countries”, *National Tax Journal*, Vol. 53 no. 2, June 2000, pp. 299-322.

⁶⁷Terra&Wattel. 5th Edition. page 371.

⁶⁸*Ibid.*

⁶⁹De Brabanter, V., “The Danner Case: elimination of Finnish tax obstacles to the cross-border contributions to voluntary pension schemes”, *EC Tax Review* – 2003-3, pp.167-172.

Moreover, the Member States, considering the principle of symmetry may preserve the correlation between the amounts, which will be, deducted from the taxable income and the amount, which will be subject to tax.

2.1.2.2 Principle of exclusiveness

The principle of exclusiveness refers to situations when the payment is exempted in the hands of the beneficiary, then it cannot be deductible expenses in the hands of the payer. Therefore, the income stream must be captured in the tax net in some stage along the way of that stream in the tax net.

Consequently, the principle of exclusiveness has the effect to impede double deduction or double exemption in the same income stream.

Considering the pension taxation principles, if a Member State would allow the right to deduct/exempt the contributions paid to a pension institution established abroad, the provision either by unilateral or bilateral treaties would have to follow the principle of exclusiveness. The violation of this principle could induce to distortions and inequities on the domestic tax system⁷⁰.

This principle can also avoid double non-taxation, since in the same chain is avoided double deduction or double exemption.

2.1.2.3 Principle of legal certainty

The principle of legal certainty is associated to the principle of the constitutional Member State.

Subordinated to the principle of legal certainty, taxation “can only be levied if the taxpayer realizes a taxable event to which a tax liability is attached by law⁷¹”.

The measure determining the basis for taxation must ascertain that the tax burden is predictable and calculable by the taxpayer⁷².

Therefore, legal conditions like object, purpose and extent, which are inaccurate can allow various interpretations. These many interpretations can compromise the principle of legal certainty of taxation, since within a tax system the elements, like taxable person, object, tax base, and so on must be clear and identified in the tax provisions.

⁷⁰Vito T. and Howell H.Z., “Tax Policy for Emerging Markets - Developing Countries”, National Tax Journal, Vol. 53 no. 2, June 2000, pp. 299-322.

⁷¹Estreicher, A. and Spengel, C., “Tax harmonization in Europe: the determination of corporate taxable income in the Member States”, European Taxation, 2007.

⁷²*Ibid.*

Regarding to the effects for the taxation, the legitimacy of administrative procedure might not be properly supervised if the taxable event is not distinctly described. However, the principle of legal certainty is not considered to be infringed upon while the tax provisions are not entirely defined or excluded. On the contrary, the indefinite legal terms "...should transfer to another level the task of defining the taxable events in statute using objective and defined criteria⁷³".

Therefore, while not legally established and well defined the object, the taxable person, the extent and other important elements of taxation, by tax treaties, either unilaterally or bilaterally, the restriction on the deduction/exemption on contributions paid to a pension institution established outside the tax jurisdiction of the resident Member State of the employer, for example, still being a legal impediment.

2.2 The freedom of movement of services

Article 56⁷⁴ of the TFEU assures the freedom to provide services and prohibits restriction to this freedom. The freedom is important since it is established in the TFEU and because of that must be followed and correctly applied by the EU Member States.

In this respect, the Commission in its proposition on the elimination of tax barriers to the cross-border rules of occupational pension⁷⁵, took into consideration the supervision of the national tax legislation of the Member States in compliance with pension and life assurance and above all, the safeguard of the fundamental freedoms of the TFEU⁷⁶. Moreover, in its Communication, the Commission assured that domestic measures, which required the payment for the pension plan taken out with a pension institution established in a national territory, were contrary to the fundamentals freedoms of the TFEU.

This section will demonstrate the nature and scope of the application of the fundamental freedom of the TFEU. This provides and guarantees that EU nationals and legal persons will not suffer any discriminations or restrictions.

⁷³*Ibid.*

⁷⁴Article 56 TFEU "...restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

⁷⁵COM(2001), 214, 19 April 2001.

⁷⁶De Brabanter, V., "The Danner Case: elimination of Finnish tax obstacles to the cross-border contributions to voluntary pension schemes", EC Tax Review – 2003-3, pp.167-172.

2.2.1 The nature of the freedom

The freedom to provide services conferred to EU nationals established or living in the EU provide services in another Member State and they must also have the equal treatment of the nationals of that state. The cross-border element is necessary to the application of the Article 56 of the TFEU.

Article 56 of the TFEU prohibits any restriction that can hinder a provider of services to exercise this freedom. Along this line, national rules of the Member States that make the provisions of services between Member States more complex are prevented by the Article 56.

Furthermore, Article 57⁷⁷ defines the notion of service and, the three elements that compose the concept are the services, remuneration and temporary.

The service is generally provided for payment and “on a temporary basis⁷⁸”. The latter element is what establishes the distinction between the service and establishment from the EU law perspective. Therefore, according to Barnard “the duration of the service⁷⁹” will define this subtle line between service and establishment. Consequently, if a person will stay in the host state, the provision on freedom of establishment will be applied, on the contrary if a person will stay in a temporary ground, the provision of the free movement of services will be required.

Therefore, if a Member State requests for “a service provider⁸⁰” to have a subsidiary or a branch in the state, this requirement breaches the freedom to provide services and this is the exact link with the cross-border mobility of occupational pensions⁸¹.

As a consequence, Member States that require that the pension institution must have their primary or secondary establishment in the state in order to have the same tax privileges that are granted to resident companies or permanent establishments are contrary to the fundamental freedom to provide services. Examples of law cases about direct taxation, in which the national rules infringed Article 56, are Bachmann⁸², Safir⁸³, Danner⁸⁴ and Skandia/Ramstedt⁸⁵. These cases dealt with the deduction of contributions and/or the taxation of the benefits on cross-border pension agreements⁸⁶.

⁷⁷Article 57 TFEU “Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration...”.

⁷⁸Barnard, C., The substantive Law of the EU. Third Edition, 2010. p,361.

⁷⁹Barnard, C., . The substantive Law of the EU. Third Edition, 2010. p,369.

⁸⁰*Ibid.*

⁸¹Barnard, C., The substantive Law of the EU. Third Edition, 2010.

⁸²Case C-204/90

⁸³Case C-118/96

⁸⁴Case C-136/00

⁸⁵Case C-422/01

⁸⁶Terra & Wattel. 5th Edition. p.36.

3 The Case law of the ECJ – Analisis

3.1 General Considerations. Justification analysis

The investigation of the relevant case law of the ECJ is important for this thesis, since they bring the key elements to the analysis of the main problem, which is the restriction on tax deductibility of pension contributions paid into a pension institutions established in another Member State.

The Bachmann Case, on private pension system (Pillar 3), was the first case dealing with the tax barriers and the justifications of discrimination on pensions and after Bachmann many cases have been decided by the ECJ as a request for a preliminary ruling on pension taxation⁸⁷. The Bachmann Case has elements, which may help to comprehend why the restriction on tax deductibility of pension contributions paid across the border remains a challenge to the European Commission, as well as to the ECJ.

The arguments of the Member State are based on the justifications of fiscal cohesion and effectiveness of fiscal control and the preservation of the tax base⁸⁸.

The fundamental freedom to provide services is also raised in the case law, since they are the rights guaranteed to EU nationals (legal persons).

The intention to analyze the case law of the ECJ is to show how the ECJ has ruled on cases about pension taxation since 1990s and if the judgments of the Court have taken the same line as the Commission's view which is that a foreign pension institution must be entitled to tax relief if the domestic pension institution is qualified to the same. In addition, it is to analyze why the Member States still maintain the same arguments, and it will be mentioned below, in all cases about pension taxation.

Then, considering the case of pension taxation, where tax advantages and fiscal benefits can be established to give privilege to the domestic

⁸⁷The taxation of occupational pensions in the European Union. Available at: http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm

⁸⁸ Wielockx, Case C-80/94; Safir, Case C-118/96; Danner, Case C-136/00; Skandia, Case C-422/01; Commission v. Belgium, Case C-522/04; Commission v. Denmark, Case C-150/04.

pension institution, the concern may come to light whether discriminatory or restrictive treatment can be justified by the Member State. According to Prats, this issue has been discussed “among tax scholars⁸⁹”, since the Bachmann case, which stated the necessity to safeguard the cohesion of the tax system could justify the restriction of the deductions of contributions paid to foreign institutions.

Therefore, the ECJ may permit other grounds of justification, other than expressly mentioned in Article 52 of the TFEU, applying to overriding general interest. A fact raised by Wathelet⁹⁰ is that the Member State never invokes the exercise of public authority, public policy, public health or public security.

According to Helminen⁹¹, indirect discrimination, based on the ECJ case law, is denominated by the rule of reason principle. This indirect discrimination could be justified on reasons not specifically defined in the TFEU. In this case, as stated by Helminen⁹², the national rule or the indirect discrimination must be applied in an indiscriminate condition.

Therefore, when national tax legislation established some restrictions on the fundamental freedoms, such restrictions should be “justified on the basis of the rule of the reason principle if the tax treatment has an objective that is in accordance with the TFEU and which is justified by an overriding reason in the public interest⁹³”.

Therefore, in order to justify the restriction on tax treatment, the proportionality test may be applied. In this case, the national provision that impedes or causes the exercise of the fundamental freedoms to become more difficult must fulfil the four requirements listed below in order to legitimize a restrictive tax treatment.

- they must be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue; and
- they must not go beyond what is necessary in order to attain it (...) ⁹⁴”.

⁸⁹ Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13.

⁹⁰ Wathelet, M., “The Influence of Free Movement of Persons, Services and Capital on National Direct Taxation: Trends in the Case Law of the Court of Justice”, *Yearbook of European Law*, 2001.

⁹¹ Helminen. 2.2.5.1, 2010.

⁹² Ibid.

⁹³ Helminen. 2.3.1, 2010.

⁹⁴ Gebhard Judgment, Case C-55/94, para. 37.

Some reasons that have been accepted by the ECJ as a justification for restrictive tax treatment on the fundamental freedoms of the TFEU are “safeguarding effectiveness of fiscal supervision; safeguarding balanced allocation of taxing rights between Member States; need to prevent a double use of losses; safeguarding fiscal cohesion of the national tax system; anti-avoidance purpose and territoriality principle⁹⁵”.

Therefore, in order to understand the ruling of the ECJ, the justifications will be briefly explained below, starting with the fiscal cohesion justification, following the effectiveness of fiscal control and the last one, the balanced allocation of taxing power.

The fiscal cohesion of national tax system is a justification based on the ECJ case law. According to Wathelet, “it is the only justification ever accepted by the Court of Justice...⁹⁶”.

The justification can be defined as the cohesion that must exist between tax base reductions and the equivalent base increases within the same tax jurisdiction⁹⁷.

The ECJ has referred to the necessity to meet certain conditions to consider the fiscal cohesion concept, which are to be “within the same taxing jurisdiction, tax base reductions and corresponding tax bases increases, such as:

- losses and corresponding profits,
- deductions and corresponding benefits, such as annuity contributions and annuity benefits,
- income and the expenses incurred in earning it,
- accrual of unrealized capital gains and taxation of those gains upon realization, etc.⁹⁸”

According to Advocate General Poiares Maduro, in his Opinion in Marks & Spencer, the concept of the fiscal cohesion is considered

“an important corrective function in Community law it serves to correct the effects of the extension of the Community freedoms to the tax systems whose organisation is in principle a matter for the sole competence of the Member States. In fact, the application of the freedoms of movement has to be prevented from giving rise to unwarranted interference with the internal logic of national tax regimes.

⁹⁵ Helminen. 2.3.1, 2010.

⁹⁶ Wathelet, M., “The Influence of Free Movement of Persons, Services and Capital on National Direct Taxation: Trends in the Case Law of the Court of Justice”, Yearbook of European Law, 2001, p.16.

⁹⁷ Terra & Wattel. Fiscal Handboeken. European Tax Law, 2011.

⁹⁸ Terra&Wattel. 5 Edition. p. 368.

... The function performed by fiscal cohesion is the protection of the integrity of the national tax systems provided that it does not impede the integration of those systems within the context of the internal market⁹⁹ “.

The coordination of tax payments was accepted by the ECJ, as a justification for discriminatory tax treatment of pension and life assurance paid abroad, for the first time in *Bachmann Case*¹⁰⁰. However, the justification based on the fiscal cohesion has not been accepted, since *Bachmann*, in the following law cases of the ECJ on pension taxation, because, as pointed out by the ECJ, there has not been direct connection between the deductibility of insurance contributions and the taxation of pensions paid by the insurers.

Moreover, this justification has been used by the Member States, in order to maintain the cohesion of the national tax system, which is to protect the integrity of the tax base¹⁰¹.

Furthermore, in *Knobbe-Keuk* views, once an agreement is signed by a Member State, which modifies “the consistency between previous deduction and later taxation¹⁰²”, the tax cohesion is removed as a justification.

To sum up the above mentioned, since a Member State sets up a tax treaty, the argument based on fiscal cohesion cannot be utilized by the Member State, once, according to Prats “the internal coherence was modified by a tax treaty¹⁰³”.

The effectiveness of fiscal control is considered an overriding requirement of general interest competent to justify a restrictive treatment against the fundamental freedom of the TFEU.

The effectiveness of fiscal control was accepted by the ECJ in the landmark case *Cassis de Dijon*¹⁰⁴ and also in *Futura Case*¹⁰⁵. Thereafter, the necessity to safeguard effectiveness of fiscal supervision to justify the restriction on the fundamental freedoms of the TFEU has been alleged in many cases on direct taxation¹⁰⁶.

⁹⁹ Case C-446/03.

¹⁰⁰ Case C-204/90

¹⁰¹ *Wielockx*, Case C-80/94; *Safir*, Case C-118/96; *Danner*, Case C-136/00; *Skandia*, Case C-422/01; *Commission v. Belgium*, Case C-522/04; *Commission v. Denmark*, Case C-150/04.

¹⁰² B.Knobbe-Keuk, “Fundamental Freedoms Enshrined in the EC Treaty by Discriminatory Tax Provisions – Ban and Justification”, *EC Tax Review* 3/94, p.234.

¹⁰³ Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13, p.18-S.

¹⁰⁴ Case C-120/78.

¹⁰⁵ Case C-250/95, *Futura Participations SA and Singer*, [1997] ECR I-2471.

¹⁰⁶ *Helminen*, 2010.

According to Helminen¹⁰⁷, the measure may include a rule or practice in order to safeguard the effectiveness tax collection in cross-border situations.

Although the effectiveness of fiscal control can be argued as a justification by the Member State, the ECJ has denied this justification¹⁰⁸. One reason, which has led to the rejection of the justification, is the less restrictive measure that the Member State could use to achieve the same result, such as to request the information from the taxpayer when the necessity to collect taxes arises¹⁰⁹. The second reason is that the Member State can invoke the Mutual Assistance Directive¹¹⁰, in order to, for example, "... exchange information on benefits paid by pension institutions to residents of another Member State¹¹¹".

Under the cross-border taxation of pensions, the argument raised by the Member States against the utilization of the Mutual Directive was that the Directive was not adequately effective to ensure the necessary information capable to verify the correct amount of income tax and/or the amount of income tax to be paid by the taxpayer. As pointed out by Manninen and Rytöhonka¹¹² the Member State can request the taxpayer to produce the necessary proof with the purpose to allow the deduction required by the taxpayer.

And the last justification, the balanced allocation of taxing power, according to Terra & Wattel, "a balanced allocation of taxing power apparently means tax base integrity for the source State¹¹³", which is raised by Member States as a justification.

The justification can also be denominated as "balanced allocation of taxing rights¹¹⁴". The justification, according to Helminen, has not been examined alone, but "together with other reasons justifying a restrictive tax measure¹¹⁵".

The balanced allocation of tax as a justification to legitimize the fiscal restriction against the fundamental freedoms of the TFEU was first accepted in Marks & Spencer II (Case-446/03) and again reiterated in N. v.

¹⁰⁷ Helminen, 2010.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Directive 77/799/EEC was repealed and a new Directive introduced on February 2009. Available at:

http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/index_en.htm

¹¹¹ Kok, C., "EC Update", European Taxation, 2001, Volume 41, No. 7, p.26.

¹¹² Manninen and Rytöhonka, "ECJ: Finnish Income Tax Regime on the Deductibility of Pension Insurance Contributions Violates the Freedom to Provide Services", European Taxation, Volume 43, No.2, 2003.

¹¹³ Terra & Wattel. 5 Edition. p.374.

¹¹⁴ Helminen. 2.3.4, 2010.

¹¹⁵ *Ibid.*

Inspecteur, Case C-470/04. In fact, the justification in these cases, according to Terra & Wattel is used “to protect the taxing power of the source state against the tax base erosion¹¹⁶”.

The preservation of the tax base is commonly used as a defence by the Member States as a justification to restrict the deductibility of the insurance contributions. They used to argue that if the contribution paid to an institution established in another Member State was deducted, the resident of a Member State with high income taxes would feel encouraged to take out pension plans with institutions established in a Member State with low income taxes. According to De Brabanter¹¹⁷, if a resident (natural or legal person) of a Member State contracted a pension plan with an institution pension established in a Member State with lower income taxes, this behaviour “could result in manoeuvres by persons seeking to benefit from the most favourable tax system¹¹⁸”, what can conduct to abuses and “fiscal forum shopping¹¹⁹”.

3.2 Case-law of the ECJ - Analysis

3.2.1 Case C-204/90 Bachmann

Mr. Bachmann was a German citizen, who moved to Belgium to work and live. He found out that he could not obtain the deductions from his Belgian income tax in relation to the contribution paid pursuant to his German insurance and life assurance contract.

Mr. Bachmann argued that the refusal of the deductions was contrary to the Community law and the Belgian Cour de Cassation decided to bring the matter to the ECJ as a preliminary ruling.

The ECJ was asked whether “*the provisions of Belgian revenue law relating to income tax pursuant to which the deductibility of sickness and invalidity insurance contributions or pension and life assurance contributions is made conditional upon the contributions being paid in Belgium was compatible with the free movement of workers and with the free movement of services, respectively articles [45] and [56] of the TFEU*¹²⁰”.

The justification used by the Belgian government was the impossibility of checking the payments of contributions made in another

¹¹⁶ Terra & Wattel. 5 Edition. p.373.

¹¹⁷ De Brabanter, V., “The Danner Case: elimination of Finnish tax obstacles to the cross-border contributions to voluntary pension schemes”, EC Tax Review – 2003-3, pp.167-172.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ AG Opinion in Case C-204/90 Bachmann, para. 1.

Member State and, the main argument was “the need to ensure the cohesion of the tax system in relation to pensions and life assurance¹²¹”.

According to Catherine Barnard opinions, the Belgian rules on taxation had conceded to the taxpayer the opportunity to decide to deduct the tax on premiums and then tax the future benefits and on the contrary to pay tax on the premiums and to have the deduction on the future benefits. According to her, “If Bachmann was able to deduct tax on premiums paid in Germany, the Belgian authorities would have no way of being able to tax future benefits also payable in Germany¹²²”.

This was the argumentation of the Belgian government since they could deduct tax on premiums based in their domestic rules or, on a later date, tax the payments¹²³. In this case, Mr. Bachmann’s German insurance was not under the Belgian national rules on tax, and if Mr. Bachmann would like to have any tax advantages on his benefits payments he should go back to Germany when the payments were due and consequently be outside the jurisdiction of the Belgian tax authorities¹²⁴.

In addition, there was no tax co-ordination agreement between Belgium and Germany in order to remedy the issue¹²⁵.

In 1990, the Court gave the judgment concerning the interpretation of the provision on free movement of workers, free movement to provide services and free movement of capital.

The Court concluded that the Belgian provisions on pensions could possibly breach the fundamental freedoms of movement of workers and services¹²⁶. Despite that potential breach by the Belgian rules, the ECJ, held that the aforementioned discrimination was justified by the need “to preserve the cohesion of the national tax system¹²⁷”.

The justification was accepted by the ECJ, since the cohesion of tax system was a matter for each Member State, which means that if a Member State was obliged to allow the deduction of life assurance contributions paid in another Member State, the Member State of origin would be able to tax sums payable by the insurers as well.

¹²¹Case C-204/90

¹²²Barnard, C., *The substantive Law of the EU*. Third Edition, 2010. p,280.

¹²³Hanlon, J., “European Law Review. Pension integration in the European Union”, *European Law Review*, 2004, 29(1), pp.74-93.

¹²⁴*Ibid.*

¹²⁵*Ibid.*

¹²⁶Hanlon, J., “European Law Review. Pension integration in the European Union”, *European Law Review*, 2004, 29(1), pp.74-93.

¹²⁷Terra & Wattel. *European Tax Law*. 6th Edition. 2012.

The Court in this point recognized that the measure, which did not allow the deduction of the contribution, was justified by the need to ensure the cohesion of a tax system and was not contrary to the Article 48 of the TFEU.

Despite of the fiscal cohesion defence was formally reiterated in the following cases like *Danner*, the ECJ indeed never accepted the justification again as such.

In accordance with *Terra & Wattel*, the case was judged “incorrectly” by the ECJ, since “the national measure (refusal of deduction) was clearly disproportionate, as nothing prevented Belgium from letting Mr. Bachmann have his deductions, and to recapture them only if necessary, i.e. where Belgium would lose taxing power (upon emigration)¹²⁸”.

Nevertheless, the ruling of the ECJ allowed Belgium to deny the deduction of the contributions paid to a pension institution not established on Belgian soil and since the insured was in Belgium on a temporary basis, Belgium would have no possibility to recapture the deductions or to tax the later annuity benefits¹²⁹.

In the view of Prats, “the restriction was therefore considered justified because it was coherent¹³⁰”, and the national rules had the direct link “between the deductibility of the contributions and the taxability of sums payable by the insurers under pension and life assurance contracts¹³¹”.

Another point of view that goes in the same direction of the above mentioned is that the ECJ admitted the justification because when the judgment was made in 1992, EU law was in its stage of development and therefore didn’t have mechanisms to safeguard “the coherence with less severe measures¹³²”, which means that at that time to deny the tax deduction was proportionate.

It appears that the *Bachmann* case might be used as a defense for Member States to “continue with discriminatory tax treatment of non-domestic life assurance and pension provisions¹³³” and the justification to tax discrimination could be “justified by the lack of the cohesion among tax regimes¹³⁴”.

¹²⁸Terra & Wattel. 5th Edition. p.384.

¹²⁹Terra & Wattel. European Tax Law. 5th Edition, p.384.

¹³⁰ Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, *European Taxation*, 2001 (Volume 41), No. 13, p.18-S.

¹³¹*Ibid.*

¹³²Röndeldt, T. and Werlauff, E., “Danish Taxation of Pensions in the Perspective of the EU Law: A legal Assessment of Denmark’s Reaction to the Judgment Against Denmark in Case C-150/04, the Commission v. Denmark.”, *INTERTAX*, vol.36, 6/7, Kluwer Law International, 2008.

¹³³Hanlon, J., “European Law Review. Pension integration in the European Union”, *European Law Review*, 2004, 29(1), pp.74-93.

¹³⁴*Ibid.*

Nevertheless, since the judgment of *Bachmann*, the ECJ has been resistant to admit the fiscal cohesion “as a justification for tax treatment constituting a restriction on the basic freedoms¹³⁵”.

3.2.2 Case C- 80/94 *Wielockx*

Mr. *Wielockx* was a Belgian resident, who was self-employed in the Netherlands, the source state. The Dutch law in respect to self-employed nationals allowed them to invest a part of their profits in a private pension (Third pillar) plan free of income tax¹³⁶. However, this benefit has not been given to non-Dutch citizens.

Mr. *Wielockx* requested the deduction of a specific amount that represented his contribution to the pension reserve from his income in the Netherlands, but it was refused by the Dutch tax authorities¹³⁷.

He appealed against the decision and the Court stayed the proceedings and requested the ECJ as a preliminary ruling asking whether a Member State infringes the freedom of establishment if it allows a resident to deduct from its taxable income business profits in form of a pension reserve, whilst denying the same benefit to EU nationals who reside in another Member State, but receive their income in the first Member State. And whether the different tax treatment could be justified by the fact that the pension payments taken from a pension reserve by a non-taxpayer are taxed in the Member State of residence and not in the Member State in which he works, since the first Member State has signed a double-taxation convention.

The Dutch Government relied on the fiscal cohesion, referred in *Bachmann*, arguing that it might have “a correlation between the sums which are deducted from the taxable income and the sums which are subject to tax¹³⁸”. They also argued that “the pension would not be taxed in Netherlands”, since Mr. *Wielockx* was a non-resident and the double-taxation convention between Belgium and the Netherlands stated that the taxpayer is “taxable in his country of residence¹³⁹”.

According to *Wathelet*, the Dutch Government “was logical that a non-resident should not be able to deduct pension contributions since the convention for the avoidance of double taxation between Belgium and

¹³⁵Helminen. 2.3.6, 2010.

¹³⁶Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review.

¹³⁷C-80/94, para.11.

¹³⁸C-80/94, para.23.

¹³⁹Kok, Coraline. European Taxation, 2001, p.26.

the Netherlands provided that pensions were to be taxed in the state of residence¹⁴⁰.”

In addition, this would clearly be the consequence since most of the Member States follow Article 18 of the OECD Model Double Taxation Treaty¹⁴¹, i.e. the pension and other similar payments will be taxable in the state of residence.

In summary, “Dutch legislation allowed residents to deduct only expenses or contributions to a pension reserve¹⁴²”.

Otherwise, “the Contribution State¹⁴³” is not allowed to claim that the efficacy of fiscal supervision is unfeasible in the event of payments performed abroad, since the Member State may use the Mutual Assistance Directive¹⁴⁴ with the aim to attain the necessary information or to request from the taxpayer the necessary documentation to ensure the effective fiscal control.

The Advocate General Léger delivered his opinion on 31 May 1995.

First, the AG rejected the argument of the Netherlands Government which was the justification of the restrictive tax treatment based on the fiscal cohesion. At this moment, the AG stressed the fact that the circumstances in the Bachmann Case were different from the facts of this case (Wielock). In the Bachmann Case “the Belgian State could not tax the annuities or benefits paid either at source or in the hands of the recipient”, in Wielockx Case, before the liquidation of the pension reserve the company cannot touch the assets. Then after the company liquidates the benefits will be paid the company when the “either as capital or as periodic payments by the enterprise, which is the debtor and the creditor is the beneficiary of the pension reserve¹⁴⁵”. Therefore, according to the AG “the tax cannot be levied on¹⁴⁶” the creditor, but can be levied “at source on the undertaking¹⁴⁷”, which “is established in the Netherlands¹⁴⁸”. At this point, the AG made clear the difference between Bachmann and this Case, which is that in Bachmann the undertaking was established in another Member

¹⁴⁰ Wathelet, Melchior. Yearbook of European Law (2001), p.17.

¹⁴¹ Article 18. PENSIONS - Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State”. OECD Model Double Taxation Treaty.

¹⁴² Wathelet, Melchior. Yearbook of European Law (2001), p.7/8.

¹⁴³ Terra&Wattel. 5 Ed. p. 399/400.

¹⁴⁴ Directive 77/799/EEC was repealed and a new Directive introduced on February 2009 - http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/index_en.htm

¹⁴⁵ C-80/94, para. 61.

¹⁴⁶ C-80/94, para. 64/64.

¹⁴⁷ C-80/94, para. 64/65.

¹⁴⁸ *Ibid.*

State, which is not the case here, since the undertaking was established in the Netherlands.

In reiterating the above mentioned, Léger stated that a double-taxation convention cannot legitimize an infringement of EU law. Moreover, the fundamental freedoms of the TFEU take precedence over “considerations of cohesion between the Dutch and Belgian tax regimes¹⁴⁹”.

To conclude, Advocate General Léger stated that “the discriminatory treatment of non-resident national was contrary to EU law¹⁵⁰”.

The ECJ followed the AG’s opinion and held that the Netherlands national rules on taxation which denied the deduction of the pension contributions, since the person is a non-resident taxpayer, was considered indirect discrimination contrary to the freedom of establishment (Article 49 of the TFEU) and consequently “could not be justified on the ground of fiscal cohesion¹⁵¹”.

The Court ruled that (para.24) the outcome of the double-taxation convention, following the OECD model, which was that the Member State taxes all pension received in its territory, i.e. the principle of residence taxation of pensions. So, in this case the fiscal cohesion, regarding to the Court, was not established in relation to one and the same person and the close correlation between the deduction of the contributions and the taxations of pension, but on the contrary was shifted to another level, i.e. the double-taxation convention applicable in the Contracting States¹⁵².

Despite of the importance of the facts in *Wielockx*, the main characteristic of the case was the long debate about the *Bachmann* Case in the Advocate’s General’s Opinion¹⁵³. Although the discussion on the *Bachmann* Case, the ECJ did not adopt the same line of reasoning, on the contrary the Court held that the double taxation convention achieved by the Netherlands and Belgium, have renounced “the right to ensure fiscal cohesion at individual level¹⁵⁴”.

¹⁴⁹ Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review, p.12.

¹⁵⁰ C-80/94.

¹⁵¹ Barnard -2010, page 304.

¹⁵² C-80/94, para. 24.

¹⁵³ Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review.

¹⁵⁴ Wathelet, Melchior. Yearbook of European Law (2001), p.17.

3.2.3 Case C-118/96 SAFIR

Mrs. Jessica Safir was a resident in Sweden. She invested in a life assurance with the “Skandia Life Assurance Company”, a British insurance company that carried out its activities by means of freedom of services on the Swedish market. The British insurance company was wholly acquired “by the Swedish insurance company Skandia¹⁵⁵”.

Mrs. Safir requested to the Swedish tax authorities for exemption from payment of tax, which would be due, in accordance with the Swedish tax legislation, “on the insurance premiums paid by a Swedish resident to a foreign insurance company”. The Swedish tax authorities denied Mrs. Safir an exemption, but instead they reduced the amount of the Swedish tax on the insurance premium by 50%. Mrs. Safir decided brings legal proceedings against the decision before the Swedish Court. The Swedish Court decided to stay the proceedings and referred the matter to the ECJ as a preliminary ruling regarding the compatibility of the tax in question with EU law.

The Swedish taxation rules in force when the case was brought to the ECJ, is well interpreted by Marc Dassesse in his article, that is

“If the insurer is established in Sweden, the Swedish resident policyholder does not have to pay tax on insurance premiums. Instead, tax is levied at the level of the insurance company. This tax is based on the return on the amount invested by the policyholder (“yeld tax”).

If the insurance policy is concluded with an insurer established abroad there is no yeld tax levied on the insurer. Instead, a tax is levied at the level of the policyholder on the premiums paid by the policyholder to the foreign insurer. It is up to Swedish policyholder to inform the Swedish tax authorities that an insurance policy has been taken out with a foreign insurer to tell the authorities which insurance company this is. Under certain circumstances, the Swedish policyholder may obtain from the Swedish tax authorities either an exemption from the tax on the premiums or a reduction of 50%. Both the exemption and reduction depend on the level of taxation that the foreign insurer is subject to in his home country in relation to the applicable tax payable in Sweden to Swedish insurers¹⁵⁶ .

The ECJ, in fact, found that the legislation provided “different tax regimes for capital assurance policies¹⁵⁷”, which was subordinated whether the company was established in Sweden or abroad was contrary to the freedom to provide services. The Swedish government justified its different tax treatment on the impossibility “to apply the same regime in

¹⁵⁵C-118/96, para.2.

¹⁵⁶Dassesse, Marc. “Has the Safir judgment overturned the Bachmann judgment?” International Journal of Insurance Law, part 2, April 1999, pp.115-125.

¹⁵⁷C-118/96, para.24.

both cases and that it is necessary to fill the fiscal vacuum which arises from non-taxation of savings in the form of capital life assurance taken out with companies not established in Sweden¹⁵⁸”.

The Swedish government went further and argued that although the taxation rules were discriminatory, it could be justified and moreover, that the legislation “It is designed to maintain effective fiscal supervision while ensuring fiscal cohesion of the national tax system: these are general interests which have been expressly recognized in case-law as worthy of protection¹⁵⁹”.

The Advocate General Tesauro delivered his Opinion in September 1997.

AG Tesauro was accurate in his opinion of rejecting the arguments of the Swedish authorities. He stated that “the different tax treatment affects all the policyholders” and also impacts on the companies that provides the service, “depending on whether or not they have a permanent establishment in Sweden¹⁶⁰”.

In order to reiterate above mentioned he asseverated that “insurance companies without an establishment in Sweden — since only the premiums paid by their policyholders are liable to tax — are at a clear disadvantage in relation to insurance companies established in Sweden, which entails, or in any case could entail, a not inconsiderable restriction on the pursuit of their business in the State concerned¹⁶¹”.

The conclusion is that the restrictions on tax treatment, even though indirectly, but “based on the establishment of the provider of the service”, “are liable to restrict its cross-border activities¹⁶²” which therefore is contrary to the freedom to provide services (Article 49 of the TFEU).

The ECJ answered the question and gave the judgment in 1998.

The Court ruled that the Swedish taxation rules did breach Article 49 of the TFEU, since it rendered “the provision of services between Member States more difficult that if the service had been provided within a Member State¹⁶³”.

¹⁵⁸ C-118/96, para.24.

¹⁵⁹ AG Opinion, Para. 20.

¹⁶⁰ AG Opinion, Para. 22.

¹⁶¹ *Ibid.*

¹⁶² AG Opinion, Para. 23.

¹⁶³ Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review.

The ECJ stressed that the Swedish legislation on life assurance policies imposed on persons who take out insurance with companies established in another Member State “may dissuade interested persons from taking out capital life assurance with companies not established in Sweden, since no particular action on their part would be called for if they took out such assurance with companies established in Sweden, the tax being levied in this case on the company¹⁶⁴”.

In addition, to have an infringement one the fundamental freedoms, in this case, the freedom to provide services, it is just to prove that the requirements imposed are more onerous than the requirements imposed on domestic workers or domestic companies, since there can be less restrictive measures.

Therefore, the discriminatory treatment was in the regime of taxation, in which the policyholders insured with insurance institution established in another Member State were taxed on their premium payments, while policies taken out with institutions established in Sweden were taxed partly on the savings capital with the insurer and partly on the yield paid to policyholders. The proceeds of the premium were not applied in a way which could be relevant considering the Bachmann ruling.

The judgment in Safir has its importance, considering “the contribution tax to be incompatible with the freedom of services¹⁶⁵”. However, once more the Member States concerned relied on the principle ruled in the Bachmann case, which was: the tax treatment that infringed the fundamental freedoms of the TFEU was justified by the need to ensure the cohesion of national tax system.

3.2.4 Case C-136/00 DANNER

The case concerns Mr. Danner, a medical doctor, with German and Finnish nationality. He lived and worked in Germany until 1977 when he moved to Finland. Although living in Finland he voluntarily had paid contributions to two German insurance schemes, they were German Bundesversicherung für Angestellte (BfA) and the Berliner Ärzteversorgung. The BfA was, in principle, compulsory for everyone who worked as employee in Germany. And the other one, the Berliner, had its internal rules and was governed by them and was operated as a supplementary pension insurance scheme for medical doctors. The payments, even though he was no longer required to pay, would increase his pension entitlements.

In 1996, Mr. Danner sought the deduction of a certain amount from his taxable income. Nevertheless, according to the Finnish income tax law, pension contributions paid to compulsory pension schemes whether Finnish or paid abroad are wholly deductible from taxable income.

¹⁶⁴C-118/96, para.26.

¹⁶⁵Terra&Wattel. 5 Ed. page 43.

Otherwise, pension contributions paid to supplementary pension insurance are subject to different tax treatment, i.e. whether the scheme has been taken out with an institution established in Finland or an institution established abroad. In summary, if the plan was contracted with an institution established abroad, the deduction of pension contributions paid to the supplementary pension scheme is excluded.

Mr. Danner brought his complaint to the Kupio Administrative Court arguing that the pension contributions paid to the German schemes should be deductible to the same extent as the pension contributions paid to supplementary pension schemes contracted with institutions established in Finland.

The Finnish Court was uncertain about the matter and decided to stay the proceedings and request the ECJ for a preliminary ruling about the compatibility of the facts with Articles 6, 59, 60, 73b, 73d and 92 of the EC (now Articles 12, 49, 50, 56, 58 and 87 of the TFEU). However the main question was the following:

‘Is the restriction ... of the right to deduct for tax purposes pension insurance contributions payable from Finland to a foreign institution, laid down in the first sentence of Paragraph 96(9) of the Finnish Income Tax Law, contrary to Article 59 of the EC Treaty(now Article 49) ... or to the other articles referred to in the appeal (Articles 6, 60, 73b, 73d and 92 of the EC Treaty ...(now Articles 12, 50, 56, 58 and 87))¹⁶⁶’.

The Finnish Government based its arguments fundamentally on the grounds of the principle of fiscal cohesion, which were:

- the need to ensure the coherence of the Finnish tax system;
- the effectiveness of fiscal controls and the need to prevent tax evasion;
- the need to protect the integrity of the tax base.

In fact, what happened is that Finland had no income tax to collect and because of this deduction for contributions paid abroad could not be granted. The loss of revenue as a consequence of the deductibility of contributions was compensated by taxation on benefits.

The last argument of the Finnish Government was the need to protect the integrity of the tax base, considering that the contributions paid to foreign institutions could be deducted, “residents of Member States with high income tax rates would have a strong incentive to take out pension

¹⁶⁶C-136/00, para. 23.

arrangements with providers in Member States with low income tax rates¹⁶⁷”.

AG Jacobs delivered his Opinion about the Case in 2002.

The Advocate General Jacobs initiated his argumentation noting that the Finnish taxation rules are overtly discriminatory and restrict the freedom to provide services. He went through all the arguments submitted by the Finnish government. He stated that the restriction on the freedom to provide services may be compatible with EU law only if justified in one of the two different grounds, which are:

-“by an exemption expressly provided by the Treaty (Article 52 of the TFEU) or

-by a justification that has been recognized by the ECJ and accepted as overriding requirements in the general interest¹⁶⁸”.

He also pointed out, that the fiscal cohesion argued by the Finnish government was inadequate in this case, since there was no link between the deductibility of contributions and the taxation of pensions, as the ECJ had ruled in *Bachmann*. He concluded that the way to ensure the effective fiscal supervision could be “secured by the tax convention with Germany¹⁶⁹”.

Regarding the effectiveness of fiscal control and the need to prevent tax evasion, Advocate General Jacobs stated that

“...it is possible to attain the legitimate objectives of ensuring the effectiveness of fiscal controls and preventing tax evasion by means considerably less restrictive than a general refusal of deductibility for all contributions to foreign insurance institutions¹⁷⁰”.

AG Jacobs concluded that the tax law provisions which restrict or preclude the deductibility for income tax purposes of voluntary pension contributions to pension institutions established in other Member States are contrary to the freedom to provide services.

The Court confirmed the AG’s Opinion. First, the ECJ was assertive stating that the Finnish taxation rules “constituted a restriction on

¹⁶⁷Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review.

¹⁶⁸AG Opinion, para 32.

¹⁶⁹Manninen and Rytöhonka. “ECJ: Finnish Income Tax Regime on the Deductibility of Pension Insurance Contributions Violates the Freedom to Provide Services”. European Taxation 2003 (Volume 43), No. 2.

¹⁷⁰AG Jacob’s Opinion, para 32.

the freedom to provide services¹⁷¹” and the refusal of the deductibility of the pension schemes taken out abroad was likely to discourage foreign institutions from providing service in Finland.

Then the ECJ continued point by point on each of the justifications.

In respect to the fiscal cohesion the Court pointed out that there was no direct connection between the deductibility of insurance contributions and the taxation of the pensions paid by insurers, since “pensions payable by foreign institutions to Finnish residents are taxable¹⁷²”, no matter that the insurance contributions have been paid to accumulate pensions “have or have not been deducted from the taxable income of the recipient¹⁷³”.

Corroborating the above mentioned, the Court of Justice stated that following the Wielockx judgment, where there is a double-tax convention in force, “the fiscal cohesion may not be invoked to justify the refusal of a deduction such as that at issue in this case¹⁷⁴”.

The argument based on effectiveness of fiscal control was also refused by the ECJ, since the Mutual Assistance Directive¹⁷⁵ allows a Member State to obtain the necessary information from another Member State’s authorities to enable to ascertain the correct amount of income tax¹⁷⁶. Therefore, the Directive gives the opportunity to the Member States to verify if contributions have been paid by its taxpayer to an institution established in another Member State. Moreover, the tax authority can request the taxpayer to produce “proof about the tax paid on contributions”. In addition the Court held that “the effectiveness of the supervision of the taxation of pensions paid to Finnish residents, it may be ensured by measures which restrict freedom to provide services to a lesser degree than a national measure such as that at issue in the main proceedings¹⁷⁷”.

The third last argument of the Finnish Government, based on balanced allocation of tax bases was also rejected by the ECJ. The ECJ stated that the need to prevent the reduction of tax revenues was not listed in Art.46 (now Article 52 of the TFEU) or even avoid the reduction of tax

¹⁷¹Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review.

¹⁷²Manninen and Rytöhonka. “ECJ: Finnish Income Tax Regime on the Deductibility of Pension Insurance Contributions Violates the Freedom to Provide Services”. European Taxation 2003 (Volume 43), No. 2.

¹⁷³*Ibid.*

¹⁷⁴Hanlon, James. “Pensions integration in the European Union”. Volume 1/2004 – European Law Review.

¹⁷⁵Directive 77/799/EEC was repealed and a new Directive introduced on February 2009 - http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/index_en.htm)

¹⁷⁶C-136/00, para. 49.

¹⁷⁷C-136/00, para. 51.

revenues to be considered as an overriding requirement in the general interest¹⁷⁸.

The conclusion of the ECJ was that the tax treatments on pensions that restricts or disallows the deductibility for tax income of voluntary pension schemes paid to institutions established abroad were contrary to Article 56 of the TFEU.

3.2.5 Case C-422/01 SKANDIA

Mr. Ramstedt, resident in Sweden, was employed by the Swedish company Skandia. Skandia proposed that Mr. Ramstedt to take out an occupational pension policy with the Danish Skandia, UK Skandia or Germany Skandia. The last three companies were considered foreign institutions.

The difference between those policies was that the Skandia Sweden was the location of the of the pension provider.

Mr. Ramstedt and Swedish Skandia requested from the Swedish tax authority answers to three questions, which were:

- (1) whether Skandia was entitled to deduct from taxable income the premiums for an insurance policy taken out with one of the above foreign insurance companies and, if so,
- (2) whether the answer to that question would be different if those foreign insurance companies undertook to provide income statements to the Swedish tax authorities for the payments made to Mr. Ramstedt under the insurance policy in question, and
- (3) whether Mr. Ramstedt should declare the payments received from the insurance as earned income and, if so, when.

The Swedish tax authority refused the deduction of the contributions taken out with an institution established in another Member State. They also argued that the Swedish tax rules on pensions did not imply any discrimination prohibited by the EU law and supported their argument based on Bachmann.

They appealed against the decision in the Swedish National Court. Since the National Court was uncertain whether the insurance policy taken out with an institution established abroad may impose less favourable treatment with regard to income tax than a pension plan taken out with an insurance institution established in Sweden, they decided stay the proceedings and referred to the ECJ as a preliminary ruling the following question:

¹⁷⁸Hanlon, James. "Pensions integration in the European Union". Volume 1/2004 – European Law Review.

“Are the provisions of Community law on freedom of movement for persons, services and capital, in particular Article 49 EC, in conjunction with Article 12 EC, to be interpreted as meaning that they preclude application of national tax rules under which an insurance policy issued by an insurance company in the UK, Germany or Denmark which meets the conditions laid down in Sweden for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in Sweden, is treated as an endowment insurance policy with income tax effects which, depending on the circumstances in the individual case, may be less favourable than the tax effects of an occupational pension policy¹⁷⁹?”

The Swedish Government relied on four grounds to justify the restriction of the freedom to provide services: the principle of fiscal cohesion, the effectiveness of fiscal controls, the preservation of the tax base and competitive neutrality.

The last argument (competitive neutrality) will not be analyzed in this thesis, as it was only applied in Skandia/Ramstedt Case as a defence. The ECJ followed the Advocate General who was imperative in his denial when he stated that the Swedish argument was “unclear and difficult to understand¹⁸⁰”.

The first argument was based on the Bachmann Case in order to justify the need to preserve the fiscal cohesion in their tax system. Moreover, the Swedish government argued using the same grounds of the Bachmann Case, i.e. that the Swedish rules had a direct connection between the deductibility of the premium and the taxability of the pension. They went further and argued that the fact that the contribution to the pension plan was paid by the employer and not by the employee was a “merely a technicality¹⁸¹”, that is that the fiscal advantages and disadvantages of the pension schemes would not concern the employer.

The second ground was founded on the need to preserve the effective fiscal control. They argued that the Mutual Assistance Directive could be insufficient to provide the necessary information for fiscal control of the tax system¹⁸². Regarding the need to preserve the tax base the Swedish government stated that the requirement of the establishment was justified by the risk of that the taxable property may disappear. On the other hand the Danish government relied on the Safir Case where the ECJ ruled that the protection of the tax base was a public interest requirement which could even justify the indirect discrimination on tax rules (Case C-118/96 Safir)¹⁸³.

¹⁷⁹Case C-422/01, para.21.

¹⁸⁰AG Léger’s Opinion, para 49.

¹⁸¹Case C-422/01, para.31.

¹⁸²Case C-422/01, para.38.

¹⁸³Case C-422/01, para.47.

Advocate General Léger delivered his Opinion on April 3, 2003.

He refuted all of Sweden's arguments and held that the differentiated tax treatment was contrary to the provisions of freedom of services (Art.56 of the TFEU).

When examining the fiscal cohesion of the tax system AG Léger was emphatic that in *Bachmann* the fiscal disadvantage was compensated for by the posterior fiscal advantage, which means there was a direct connection between the deductibility of contributions and the taxation of pensions. Moreover, in the Belgian taxation system, the loss of revenue due to the deduction of contributions was compensated for by the taxation of pensions, annuities and capital sums payable by insurance companies. In summary, the sums were exempted where contributions were not deductible. However, that was not the case of the Swedish taxation system, since they needed to wait until pensions are paid before having the right to deduct. In other words, there was a fiscal disadvantage sustained by the Swedish *Skandia*¹⁸⁴. Regarding the effectiveness of fiscal control, AG Léger stated that the Member State cannot justify discrimination contrary to the freedom to provide services when they could use the Mutual Assistance Directive¹⁸⁵, in order to get the necessary information from the competent authorities of another Member State to assure the correct amount of income tax payable¹⁸⁶.

Concerning the third justification, AG Léger was conclusive that the justification based on the need to preserve the reduction of tax revenue was not listed in Article 46 EC (now Article 52 of the TFEU) and could not be considered as an overriding requirement in the general interest¹⁸⁷.

The Advocate General Léger concluded that the Swedish legislation was contrary to Art.49 (now Article 56) of the Treaty.

The Court confirmed the Opinion of its Advocate General. The four justifications used by the Swedish government were rejected by the Court.

The first ground, based on the fiscal cohesion, was rejected by the Court, since the Swedish tax rules had no direct link between the deduction of the contributions and the taxation of pension, as the Court had found in the *Bachmann* Case. In the *Bachmann* Case, the loss of revenue resulting

¹⁸⁴ AG Léger's Opinion, para 36.

¹⁸⁵ Directive 77/799/EEC was repealed and a new Directive introduced on February 2009. Available at: http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/index_en.htm

¹⁸⁶ AG Léger's Opinion, para 42.

¹⁸⁷ AG Léger's Opinion, para 47.

from the deduction of pension contributions was offset by the taxation of pension benefits¹⁸⁸.

Concerning the second justification on effectiveness of fiscal control, just like AG Léger, the Court ruled that the Member State had the possibility to rely on the Mutual Assistance Directive, in order to request the necessary information to ascertain the correct amount of income tax.

The Court rejected the last ground founded on the need to preserve the tax base, alluding heavily to the Danner and Safir Cases.

The Court came to the decision, bringing the exact conclusion of its Advocate General, which was the freedom to provide services precludes an insurance policy taken out with a company established abroad from having different tax treatment from the policy issued by a company established in the national territory.

3.2.6 Case C-150/04 Commission v. Denmark

The European Commission sought a declaration by the ECJ, under the infringement procedure of Article 226 (now Article 258) of the TFEU and took Denmark to the ECJ.

The Commission argued that Denmark had failed to fulfill its obligations under Articles 39 EC (now Article 45), 43 EC (now Article 49), 49 EC (now Article 56) and 56 EC (now Article 63).

The Commission referred that Denmark's tax treatment for life assurance and pensions which did not grant tax deductions and tax exemption for payments made under pension plans with pension institutions established in other Member States was a discriminatory treatment against the fundamental freedoms of the EU law.

The arguments of the Commission were based on the effectiveness of fiscal control and on the fiscal cohesion.

The Commission's view on the effectiveness of fiscal control was that the Member State could rely on the Mutual Assistance Directive to ensure the recovery of the income taxes in other Member State. Therefore, Denmark could not use the principle to justify the tax treatment on pensions. The Danish government argued that the Directive 77/799 EEC had not imposed any new obligation on foreign pension institutions. Moreover, the foreign institutions could rely on their obligations of professional secrecy.

¹⁸⁸Hanlon, J., "European Law Review. Pension integration in the European Union", European Law Review, 2004, 29(1), pp.74-93.

On the fiscal cohesion, once again Bachmann was mentioned. The Commission was in line that there must be a direct link between deductibility of contributions and taxations of benefits and that connection must exist at the level of an individual taxpayer. The Danish government stated that the Danish legislation met the conditions for a direct correlation between the absence of a right to deduct and non-taxation.

Advocate General Stix-Hackl delivered his Opinion on 1 June 2006.

He rejected almost all the justifications argued by the Danish Government. He suggested only the dismissal on the infringement of the free movement of capital, since it was not restricted once the tax treatment of insurance contributions did not prevent the payment of the contribution to an institution established abroad.

With respect to the other freedoms, the Advocate General Stix-Hackl was imperative and rejected all the arguments stated by the Danish government¹⁸⁹.

AG Stix-Hackl intensified the discussion about the free movement of services. He held that the different tax treatment of contributions depending on the place of the beneficiary was discrimination and concluded that the Danish legislation was indirectly discriminatory against insurance institutions established abroad.

He was of the view that the arguments of the Danish government based on the cohesion of the tax system and effectiveness of fiscal control cannot be justified as an overriding requirement in the general interest¹⁹⁰.

The ECJ endorsed the Advocate General's Stix-Hackl Opinions. The ECJ found that the prevention of tax avoidance (see Case C 264/96 ICI; Joined Cases C 397/98 and C 410/98 Metallgesellschaft and Others and Case C 315/02 Lenz) and the effectiveness of fiscal control (see, Case C 436/00 X and Y and Case C 334/02 Commission v France) comprise an overriding requirement in general interest that can properly justify the restrictive tax rules which impedes the exercise of the freedoms of the TFEU (see, to that effect, Case C 386/04 Centro di Musicologia Walter Stauffer)¹⁹¹.

The ECJ, concerning the effectiveness of fiscal control, held that the Mutual Assistance Directive - Directive 77/799 EEC (now New Directive) entitles a Member State to require the competent authority of

¹⁸⁹AG Stix-Hackl's Opinion, para. 47.

¹⁹⁰AG Stix-Hackl's Opinion, para. 89 and 95.

¹⁹¹C-150/04, para. 51.

another Member State the information requested with the aim to assess the correct tax amount¹⁹².

In the end, the Court examined and rejected the defence that the necessity for the cohesion of the tax system ought to comprise a justification for the maintenance of the restrictive Danish legislation. The ruling of the ECJ about the cohesion of the tax system used by the Danish government was well elucidated in paragraphs 70 to 74:

“70 With regard to the justification of the cohesion of the tax system, it is established that the need to preserve such cohesion requires the existence of a direct link between a tax advantage and a corresponding disadvantage (see Case 300/90 *Commission v Belgium*, paragraph 14; Case C 484/93 *Svensson and Gustavsson* [1995] ECR I 3955, paragraph 18; *ICI*, paragraph 29; *Vestergaard*, paragraph 24; Case C 478/98 *Commission v Belgium*, paragraph 35; and *X and Y*, paragraph 52).

71 In that regard, the factor liable adversely to affect the cohesion of the Danish tax system is to be found in the fact that the transfer of the residence of the person concerned occurs between the time of payment of contributions to a pension scheme and that of payment of the corresponding benefits, and less in the fact that the pension institution is in another Member State.

72 When a Danish resident, having become a member of a pension scheme with an institution established in Denmark, receives tax advantages on the contributions paid into that scheme, then, before benefits fall to be paid, transfers his residence to another Member State, the Kingdom of Denmark is deprived of the power to tax the benefits corresponding to the contributions deducted or exempted, at least where it has concluded with the Member State to which the person concerned has transferred his residence a double taxation convention based on the OECD Convention. However, in such a case, that result is not due to the fact that the pension institution is established abroad.

73 Conversely, there is nothing to prevent the Kingdom of Denmark from exercising its power of taxation over the benefits paid by a pension institution established in another Member State to a taxpayer still resident in Denmark when that payment is made, as a counterbalance to the contributions which it allowed to be deducted or exempted. It is only in the case where, before benefits fall to be paid, that taxpayer transferred his residence to a Member State other than the Kingdom of Denmark that it might encounter difficulties in taxing the benefits paid and where, therefore, the cohesion of the Danish tax system with regard to the taxation of private pensions would be adversely affected.

¹⁹²C-150/04, para. 52.

74 It follows that, by refusing in general to grant a tax advantage in respect of contributions paid to a pension institution established in another Member State, the contested legislation cannot be justified by the need to guarantee the cohesion of the tax system¹⁹³.”

The Court in the analyzed Case above reversed the judgment in *Bachmann*, since the *Bachmann* Case, according to Terra&Wattel, was “incorrectly” judged. This was shown in the ruling of the ECJ in the present Case¹⁹⁴.

3.2.7 Case C-522/04 Commission v. Belgium

In the Case-law in question, the European Commission brought the action to the ECJ, arguing that the Belgian tax legislation on “outbound transfers¹⁹⁵” was discriminatory and impeded to the freedom to provide services.

The Commission also argued that “the taxation of outbound transfers was a forbidden restriction of the freedom of movement of workers, self-employed persons, and persons who are not economically active¹⁹⁶”. This meant that, like in the Danish legislation, the Belgian legislation authorized companies “a deduction for employer contributions and premiums” when they are paid to an insurance companies or pensions funds established in Belgium¹⁹⁷. Certain provision also allowed the transference of the capital or surrender values to a comparable plan with another pension and insurance company through “a tax-free transfer”, which was not possible if the insurance company was established in another Member State¹⁹⁸.

The Commission also pointed out that the Belgian legislation requiring foreign insurance companies to nominate a representative residing in Belgium was unnecessary, since the Mutual Assistance Directive permitted such assistance between Member States.

The only justification made by the Belgian Government was about the legislation that required the appointment of a representative residing in Belgium. The Belgian government argued that, since the legislation was amended, there was no longer an obligation to nominate a tax representative for insurance companies established in another Member

¹⁹³C-150/04, para. 70/74.

¹⁹⁴Terra B., Wattel P., “European Tax Law. 5th Edition”, Kluwer Law International, The Hague 2008.

¹⁹⁵Schonewille, Peter.“ECJ clears way for tax free transfers”. Investment & Pensions Europe. September 2007.

¹⁹⁶*Ibid.*

¹⁹⁷Thomas Røndeldt and Eirk Werlauff. INTERTAX, vol.36, 6/7. Kluwer Law International 2008.

¹⁹⁸*Ibid.*

State which had their principal place of business in the territory of the European Economic Area¹⁹⁹.

Advocate General Stix-Hackl delivered his Opinion on 3 October 2006.

He stated that the taxation on the transfer capital or surrender values was liable to constitute an obstacle to the freedom to provide service assessed by insurance companies established in other Member State.

Regarding the requirement to nominate a tax representative, he referred to the Mutual Assistance Directive - Directive 77/799 EEC, which could be used by the Member State in order to combat tax evasion, which excludes the necessity to appoint a tax representative. Moreover, he stated that this requirement was an obstacle to the freedom to provide services, since it was imposed on insurance companies, which were established in other Member State.

Concerning the restriction of deductibility of the contributions paid by the employers and employees to its occupational pension schemes, Advocate General Stix-Hackl made reference to his own Opinion delivered in *Commission v. Denmark* (Case 150/04). As he held in the case-law mentioned above, the restriction impedes employed and self-employed persons to leave and pursue their occupation in another Member State, whilst retaining their occupational pension plan in the Member State of source²⁰⁰.

AG Stix-Hackl concluded that the Belgian Government had breached the Articles 18 (now Article 21), 39 (now Article 45), 43 (now 49) and 49 (now Article 56) of the Treaty.

The ECJ first ruled that any national legislation that impeded or prohibited the activities of a provider of services established in another Member States was contrary Article 49 (now Article 56).

In line with the *Commission v. Denmark* Case(Case C-150/04), the ECJ stated that the Belgian provision which hindered the tax relief for employer and employee on pension contributions paid to pension institution established in another Member State was contrary to the freedom to provide services (Article 56, TFEU).

The ECJ ruled also that it was contrary to EU law to levy income tax on transfers of pension capital to another pension fund, which was not established in Belgium, when the transfer of pension capital between pension funds outside Belgium is tax-free.

¹⁹⁹ C-522/04, para.32.

²⁰⁰ AG. Stix-Hackl's Opinion, Para. 58

In the end, the ECJ ruled against the Belgian provision on the requirement of a fiscal representative to be nominated for the foreign institution in order to be capable to do business in Belgium. In this line, according to Schonewille, Belgium could use the Mutual Assistance Directive, in order to get the necessary information to determine the amount of tax from another Member State's tax authority and that the state "could collect the tax from the insured person himself"²⁰¹.

²⁰¹Schonewille, Peter."ECJ clears way for tax free transfers". Investment & Pensions Europe. September 2007.

4 Analysis and Discussion

The deductibility of the contributions paid by residents of a Member State to pensions institutions established in another Member State has been the obstacle of cross-border mobility of supplementary pensions systems within the EU Member States.

After the considered review of the case law of the ECJ, this chapter will briefly describe the relevant issues of the judgments of the ECJ, concerning the grounds of justification raised by the Member States concerned.

In the *Bachmann* leading Case²⁰², the ECJ accepted the justification based on the fiscal cohesion, which means they denied the deduction of the contributions paid to a pension plan taken out with foreign pension institution, in order to safeguard the cohesion of the national tax system.

At the moment of the judgment of the case, Belgium and Germany didn't have any tax co-ordination agreement that could improve the matter.

Regarding the justification on the effective fiscal supervision, the argumentation could not be alleged successfully by the Member States. In the judgments in *Bachmann* and *Skandia/Ramstedt*, the ECJ followed the same ruling, which was based on the possibility of the utilization of the Mutual Assistance Directive in order to require the necessary information and/or request the taxpayer to present the irrefutable documentary proof, in case of the pension contributions paid to foreign pension institutions. In accordance with *Terra & Wattel*²⁰³ the refusal of deduction is not an adequate way to secure the effectiveness of fiscal control.

The result of the analysis is that the Court has ruled and confirmed the proposition of the Commission in its Communication²⁰⁴, and the Commission sustains the ECJ's ruling, in order to eliminate tax barriers to the cross-border of supplementary pension schemes.

In the relevant judgment in *Skandia/Ramstedt* the ECJ had not accepted any ground of justification as argumentation. Therefore, the justifications cannot impede the enforcement of the fundamental freedoms, the probability of the loss of tax revenue cannot be a reason to restrict favorable tax treatment and the difficulty to access information from the tax authority of another Member State and even the absence of tax co-ordination agreements cannot be used as justifications by the Member States.

²⁰²Case C-204/90

²⁰³*Terra & Wattel*. European Tax Law. 6th Edition. 2012.

²⁰⁴COM(2001), 214, 19 April 2001.

Therefore, the ECJ had the intention of creating an effective mechanism, in order to achieve the same tax treatment of the domestic and foreign pension schemes. However, according to Prats, the performance of the ECJ in establishing an integrated internal market for pension is limited to the interpretation of the EU rules. Consequently, the creation of an integrated internal pension market cannot be left to the ECJ's interpretation of EU law.

The second point to consider is the Commission's Communication²⁰⁵, with the intention to eliminate the tax obstacles to the cross-border of supplementary pension principally based on, the coordination of the tax systems, with respect to the fundamental freedoms of the TFEU and the preservation of the Member States' tax revenues.

Although it was the intention of the Commission to issue the above mentioned Communication, however the Council failed to reach an agreement in 2002²⁰⁶.

Another point that should be taken into consideration is the EET principle supported by the Commission. According to Prats²⁰⁷, this principle could be a part of the solution when one Member State applied the EET principle and the other Member State applied TEE, in order to avoid possible double taxation and double non-taxation. Another solution could be a double-taxation treaty with the same aim, which is to solve the double taxation issue.

In addition, the Commission, corroborated by the rulings of the ECJ, has reiterated that Member States can use the Mutual Assistance Directive, in order to exchange the necessary information on cross-border mobility of supplementary pension schemes. This "inter-administrative cooperation"²⁰⁸ would allow the tax authorities to verify the movement of their residents outside of the Member State of origin.

Consequently, arguments based on the loss of tax revenue fall apart, in order to restrict tax treatment on pension schemes, since the automatic exchange information can be used as an efficient instrument to ascertain the correct amount of taxes on a cross-border situation.

In this regard, in accordance with Prats, the Commission has taken all the steps necessary in order to assure the promotion of the integrated internal market for pensions, in compliance with "the tax revenue of the

²⁰⁵COM(2001), 214, 19 April 2001.

²⁰⁶The taxation of occupational pensions in the European Union. Available at: http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm

²⁰⁷Prats, Dr. Francisco Alfredo Garcia, "The tax treatment of cross border pensions from an EC law perspective", *European Taxation*, 2001 (Volume 41), No. 13.

²⁰⁸Prats, Dr. Francisco Alfredo Garcia, "The tax treatment of cross border pensions from an EC law perspective", *European Taxation*, 2001 (Volume 41), No. 13. p.26-S.

Member States²⁰⁹, and also reinforcing “the automatic exchange information²¹⁰”.

Therefore, the legal instruments are available to the Member States, in order to eliminate the tax obstacles to the cross-border mobility of occupational pensions, such as the restriction on tax deduction or on tax exemption for contributions paid into pension schemes taken out with pension institution established abroad.

However, from the tax law perspective, the principle of symmetry, the principle of exclusiveness and the principle of legal certainty may impede an integrated internal market for pensions, since they limit the free movements within the EU Member States.

Furthermore, the need of fiscal and the balanced allocation of taxing power require that the tax base and corresponding tax reductions should be within the same tax jurisdiction.

These justifications are also closely related to the principle of symmetry, since gains and losses of any source must have the same tax treatment.

According to Terra & Wattel²¹¹, the national tax policy should have jurisdictional coherence, which leads to symmetry and balanced allocation of taxing power within the same tax system.

Therefore, the concepts of the justifications and the principles of tax law are interrelated, which indicate that to have fiscal cohesion and the preservation of the tax base, the elements must be within the same fiscal jurisdiction.

Moreover, the EU law does not oblige the Member States to adjust their tax system to a tax system of another Member State. This indicates that the Member States have autonomy and fiscal sovereignty on their tax system. Therefore, it is on the exclusive competence of each Member State to establish double tax treaties, in order to eliminate, for example, double taxation/non-taxation.

The last point that must be raised is the infringement procedure brought by the Commission against Belgium. The infringement procedure refers on the tax deductibility of pension contributions paid across the border, i.e., just contributions paid to pensions institutions established in Belgium can be qualified for tax relief.

²⁰⁹ Prats, Dr. Francisco Alfredo Garcia, “The tax treatment of cross border pensions from an EC law perspective”, European Taxation, 2001 (Volume 41), No. 13, p.26-S.

²¹⁰ *Ibid.*

²¹¹ Terra & Wattel. Fiscal Handboeken. European Tax Law. 2011.

The Commission considers that the requirements imposed by Belgium are contrary to freedom to provide services and the freedom of movement of capital²¹².

Since the Bachmann Case, the ruling of the ECJ has been contrary to the arguments of the Member States. The infringements against the tax deductibility of pension contributions paid across the border, as the Commission has pointed out in its webpage, has been reiterated by the Member State.

The infringement procedure against Belgium has not been carried out yet by the Commission. Therefore, the question whether this will be the New Bachmann or not will be open until the judgment of the ECJ.

Hence, an integrated internal market for pensions continues to be a difficult process, because of the exclusive tax competence of the Member States, which leads to a divergence between domestic measures and EU laws²¹³.

However, the problem of the tax obstacles to the cross-border mobility of supplementary pension schemes still occurred, because of the unclear concept of the cross-border activities, the lack of supervisory measures and the difference of tax treatment of the pension schemes at national level and “the complex interaction between EU and domestic laws²¹⁴”.

Therefore, because of the lack of source of EU law, the restrictions on the tax deductibility of pension contributions paid to pension institutions established abroad are open to a future solution. May be the New Bachmann can bring some solution to the cross border mobility.

²¹²Press Release. Available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1559&format=HTML&aged=0&language=en&guiLanguage=en>

²¹³Meerten,Hans van and Starink, B., “Cross-border obstacles and solutions for Pan-European Pensions”, EC Tax Review, 2011/1,pp.30-40.

²¹⁴Meerten,Hans van and Starink, B., “Cross-border obstacles and solutions for Pan-European Pensions”, EC Tax Review, 2011/1, p.40.

5 Conclusion

As far the materials that have been investigated in this thesis, the conclusion must be that theoretically there are impediments to the Member States to develop an integrated internal market for pensions, which could be based on the principles of tax law. Besides this, the right to deduct tax on contributions paid to a foreign institution established in another Member State cannot be granted, because there is no connection between the principle of symmetry and the freedoms of movement of the EU law.

The resistance of the Member States to develop an internal market for pensions can also be related to the possible financial difficulties of the different tax treatments on tax relief and the possibility of the loss of tax revenue.

Therefore, the establishment of an effective tax pension scheme within the Member States must take into consideration these issues that are not sufficiently clarified in the legal documents, such as the conditions which must be enhanced for cross-border activities and more comprehensive tax measures on pension schemes at European level.

Even though the efforts of the Commission to achieve an integrated market of occupational pension system, the lack of competence of the Commission is one problem, which also interferes in the integration of the nationals' tax law and EU law. Furthermore, according to Prats²¹⁵, what really should be considered is to integrate the exclusive tax competence of the EU Member States with the exigencies of the EU Internal Market.

A plausible suggestion would be for the EU to adopt, in order to create an integrated pension market, "a basic pension scheme²¹⁶" which would be accepted among EU Member States. According to the authors, the main purpose would be to make available to EU workers a satisfactory "tax efficient retirement provision²¹⁷". They went further and suggested that the EU could create a pension scheme that would attend to the national tax legislation of various Member States.

Otherwise, if the Member States could have the right to allow the deduction/exempt of the contributions of supplementary pension scheme paid to a pension institution established in another Member State, this would permit pensions institutions to work more efficiently in the direction of the necessities of the workers and employers. Nevertheless, almost all Member

²¹⁵ Prats, Dr. Francisco Alfredo Garcia, "The tax treatment of cross border pensions from an EC law perspective", *European Taxation*, 2001 (Volume 41), No. 13.

²¹⁶ Meerten, Hans van and Starink, B., "Cross-border obstacles and solutions for Pan-European Pensions", *EC Tax Review*, 2011/1, p.38.

²¹⁷ *Ibid.*

States grant some level of tax deduction of the employer's contribution to pension institutions established in their own national soil.

However, after all the attempts to identify and analyze the legal sources, cases law of the ECJ, one question remains open to discussion which is: Should the Member States amend their national tax rules on supplementary pension system to improve the conditions for cross-border mobility and give the right to deduct the contributions paid to an occupational pension system established abroad? Should the states renounce their fiscal sovereignty, in order to maintain the objective of the EU law, which is the single market?

As it becomes clear from the analyses of the tax principles and the justifications, such as fiscal cohesion, effectiveness of fiscal control and balanced allocation of taxing powers, the Member State do not have legal basis to modify the provisions. Therefore, the right to deduct the contributions paid into a supplementary pension scheme can only be granted when the institution is established within the territory of the Member State.

Although considering and respecting the tax principles and fiscal sovereignty, the Member State may be aware of the prevailing political and socio-economic circumstances.

Besides, the issue about cross-border mobility of pension schemes is still an open discussion in many directions. The requirement for a uniform source rule is visible; however, it will not solve all matters relating to pension taxation. This claims an adequate operative exchange of information rule and as well an entire and outstanding cooperation of tax administrations²¹⁸ between the Member States.

²¹⁸ De Broe, Luc; Neyt Robert (2009). Tax Treatment of Cross-border pensions under the OECD Model and EU Law. Bulletin for the International Taxation, International Bureau of Fiscal Documents, March 2007.

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