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CHAPTER 2

There is Life in the Old Dog Yet: Horizontal Comparability and the Establishment of the Internal Market

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§2.01 THE *SOPORA* JUDGMENT REVIVES THE DEBATE

By tradition, the European Court of Justice (ECJ) often compares non-residents to residents in its case law on the fundamental freedoms. Residents with foreign income are also often compared to other residents with domestic income. In all these cases, this is mostly referred to as "vertical" comparison pairing. Since year one, the question arises as to whether the fundamental freedoms also allow a comparison between non-residents who receive domestic income. It is equally controversial whether residents obtaining foreign income can be compared to each other. The term of "horizontal" comparison pairing has become established for these last two constellations. Relying on the case law of the ECJ, legal scholars have regularly voiced their outright rejection of comparisons between different cross-border situations. For instance, following the judgment *Haribo and Saline* AG, Zorn held that the ECJ had spoken:

> in favour of the so-called "vertical comparison" and against the "horizontal comparison" with unparalleled clarity [...]: This confirms the scientific research [...] on the exclusive relevance of the "vertical comparison" when establishing unequal treatment under Union law.[1]

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1. Zorn, Urteil des EuGH in den Rs Haribo und Salinen AG zu § 10 KStG, *RdW* (2011): 173.

For all those who believed that the ECJ had already buried the concept of horizontal comparability, the *Sopora* judgment on February 24, 2015 must have been something of a wake-up call.[2] Kemmeren welcomed this as a "landmark decision" and interprets this decision as the beginning of a new trend in the case law of the ECJ.[3] The question whether the *Sopora* judgment should be considered as a surprising turn-around in case law will depend on how one assesses the previous case law on horizontal comparability. Therefore, I will first attempt to interpret this ECJ decision in the light of the Court's previous case law. Subsequently, I will examine the *Sopora* judgment itself in more detail.

§2.02 THE CASE LAW OF THE ECJ ON HORIZONTAL COMPARABILITY

[A] The Simultaneous Examination of Vertical and Horizontal Comparability

The ECJ case law contains several examples in which the ECJ itself eventually detected a violation against a fundamental freedom or forwarded this question to the national court for further examination, and has not only relied on a vertical comparison – that is, between two or more cross-border constellations – but substantiated its establishment of an infringement of Union law also using a horizontal comparison – that is, between two cross-border situations.

An example for this is the early ECJ judgment *Avoir Fiscal*, in which the ECJ underlined the concept of the free choice of legal form:[4] The case focused on the different treatment of companies resident abroad with permanent establishments in France vis-à-vis companies resident in France. To justify this differentiation, the French Government argued that the disadvantages of the foreign company with the permanent establishment in France "may be easily avoided by setting up a subsidiary in France."[5] The ECJ argued against this:[6]

> The fact that insurance companies whose registered office is situated in another Member State are at liberty to establish themselves by setting up a subsidiary in order to have the benefit of the tax credit cannot justify different treatment. Since the second sentence of the first paragraph of Article 52 expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions.

The ECJ thus made it clear that it also tends to consider a foreign company with a domestic subsidiary comparable to a foreign company with a domestic permanent establishment. This amounts to a comparison between two cross-border situations.

2. ECJ Feb. 24, 2015, *Sopora*, C-512/13.
3. Kemmeren, *Sopora*: A Welcome Landmark Decision on Horizontal Comparison, *EC Tax Review* (2015): 178 et seq.
4. ECJ Jan. 28, 1986, *Kommission v. Frankreich ("Avoir Fiscal")*, C-270/83, paragraph 22.
5. ECJ Jan. 28, 1986, *Kommission v. Frankreich ("Avoir Fiscal")*, C-270/83, paragraph 17.
6. ECJ Jan. 28, 1986, *Kommission v. Frankreich ("Avoir Fiscal")*, C-270/83, paragraph 22.

In the no less famous *Schumacker* case, the question of the comparison between two cross-border situations equally played a role: Although this case primarily dealt with the different treatment of non-residents – like Mr. Schumacker, who lived in Belgium – and residents in Germany. The ECJ, however, also pointed out that German law:

> grants frontier workers resident in the Netherlands and working in Germany the tax benefits resulting from the taking into account of their personal and family circumstances, including the 'splitting tariff'. Provided that they receive at least 90% of their income in Germany, those Community nationals are treated in the same way as German nationals under the German law. [...][7]

The mention of the situation of Dutch frontier workers clearly shows that the German legislator forwent the coherence of its own regulation:[8] When one treats individuals resident in the Netherlands, at least under certain circumstances, in the same manner as those resident in Germany, they cannot easily argue that it is unavoidable to distinguish between residents and non-residents in the case of a Belgian resident. In *Schumacker*, however, the ECJ thus also took a comparison between two cross-border situations into consideration:[9] It compared two individuals, the one resident in Belgium and the other in the Netherlands, who are both foreign nationals from a German perspective.

In *Cadbury*, the ECJ did not only consider British companies with an Irish subsidiary comparable to other British companies with domestic subsidiaries, but also a British company with an Irish subsidiary comparable to another British company whose subsidiary is resident in a Member State with a higher tax rate.[10]

Other ECJ judgments also fit into this line: In *A*, the ECJ considered Swedish shareholders who obtained dividends from Switzerland comparable not only to other Swedish shareholders who obtained dividends from other Member States, but even comparable to Swedish shareholders receiving dividends from European Economic Area (EEA) States or even third countries, with which mutual assistance agreements are in place.[11] In *Commission v. Netherlands*, the ECJ eventually considered the recipients of Dutch dividends resident in another Member State as comparable to those recipients of Dutch dividends who were resident in Norway and Iceland.[12]

Another example for this consistent case law is the judgment in *Commission v. Greece*.[13] At first glance, it seems that this judgment only refers to the "vertical" comparison pair: The ECJ compares the rules applying to foreigners to the more

7. ECJ Jan. 14, 1995, *Schumacker*, C-279/93, paragraph 46.
8. For more details on these considerations, *see* ECJ Aug. 11, 1995, *Wielockx*, C-80/94 paragraphs 23-25. *See also* Lang, Das EuGH-Urteil in der Rechtssache Schempp – Wächst der steuerpolitische Spielraum der Mitgliedstaaten?, *SWI* (2005): 413 et seq.
9. *See* Lang, Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions, *EC Tax Review* (2009): 104.
10. ECJ Sep. 12, 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04 paragraph 44.
11. ECJ Dec.18, 2007, *A*, C-101/05, paragraphs 41 et seq.
12. ECJ Jun. 11, 2009, *Commission v. Netherlands*, C-521/07, paragraphs 43 et seq.
13. ECJ Jan. 20, 2011, *Commission v. Greece*, C-155/09.

favorable rules applying for nationals. Yet a more precise analysis reveals that, at the same time, there are also two cross-border constellations which the ECJ deemed comparable: Under Greek tax law, certain real estate purchases by individuals who have their permanent residence in Greece were exempted from land transfer tax. This exemption also applied to:

> Greek nationals or persons of Greek origin who have worked abroad for at least six (6) years and who are entered on a municipal registry in Greece, even though their place of permanent residence is not in Greece at the time of the purchase.[14]

Greeks and "persons of Greek origin" resident abroad were therefore subject to preferential treatment as opposed to nationals of other states who are also resident abroad. The ECJ did not see any justification for this unequal treatment. This implies that, with regard to land transfer tax regulations, the Court regards non-residents who wanted to purchase land in Greece and are Greek nationals or persons of Greek origin as comparable to non-residents who also wanted to purchase land in Greece and are nationals of other states.

In the cases mentioned, treating the foreign situation worse than the domestic situation alone would have already sufficed to cause a violation of the fundamental freedom. Therefore, one could argue that the additional use of the horizontal comparison pair was unnecessary. Yet one cannot claim either that the ECJ secured its judgment with a reasoning it believes to be completely irrelevant. Otherwise the Court would have contented itself with the vertical comparison pairing in all these cases. After all, if the additional line of reasoning – based on the horizontal comparability – were not also important in those constellations in which no suitable vertical comparison pair could be found, the ECJ would not have invoked it.

[B] The Implicit Confirmation of the Vertical Comparability

The same intention lies behind the case law line in which the ECJ indeed did not regard two cross-border situations as comparable in *the respective cases to be decided* yet never ruled out the horizontal comparison pairing per se. Had the Court assumed that only vertical comparison pairs can be used, it could have made its reasoning much simpler by generally pointing out that cross-border situations can never be compared with each other. The ECJ did not, however, go down this path.

An example for this is the otherwise often rightly criticized judgment in *D:*[15] Although in its judgment the ECJ did reject the comparability of two individuals not

14. *See* Article 1 paragraph 3 of the Greek Land Transfer Tax Act no. 1078/1980; *see* ECJ Jan. 20, 2011, *Commission v. Greece*, C-155/09, paragraph 8.
15. ECJ July 5, *D.*, C-376/03. Criticized, *e.g.*, Graaf & Janssen, The Implications of the Judgment in the D. Case: The Perspective of Two Non-believers, *EC Tax Review* (2005): 173 et seq.; Kofler, Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung, *ÖStZ* (2005): 432 et seq.; Kofler & Schindler, "Dancing with Mr D": The ECJ's Denial of Most-Favoured-Nation Treatment in the "*D*" case, *European Taxation* (2005): 534 et seq.; Lang, Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Harmonisierung ins Stottern?, *SWI* (2005): 365 et seq.;

resident in the Netherlands who live in Germany and Belgium against the background of the Dutch legal situation, the reason for doing this lied exclusively in the fact that the different treatment was due to the double taxation agreement: Where the double taxation agreement between Belgium and the Netherlands treated individuals resident in Belgium and those resident in the Netherlands to a certain extent equally, no such provision existed in the double taxation agreement between Germany and the Netherlands. It is anything but convincing to see a suitable justification for an unequal treatment solely in the fact that the differentiation resulted from the double taxation agreement, since this would mean that the same regulation is compatible with Union law if found in an international law treaty but possibly controversial under Union law if enacted into national law.[16] In any event, however, this reasoning implies that the ECJ by no means universally rejects the comparability of two cross-border situations and that, in the case under consideration, it would possibly have come to a different conclusion if the different treatment had not been the result of the application of the double taxation agreement but of the originally national legislation.[17] Were the ECJ to rule out "horizontal" comparison, the Court would have chosen the much simpler solution in Case *D*, i.e., to generally reject the comparison between residents in Belgium and Germany instead of opting for the highly contestable reference to the legislation of the double taxation agreement.

Another example is the judgment in Case *OESF*:[18] The tax treatment in the Netherlands depended on whether the investment was made in a state with which the Netherlands had signed a double taxation agreement or in another state. The ECJ justified in detail why this differentiation was admissible *in this particular case*. Obviously, the ECJ assumed that a comparison between incomes from different states must by no means be automatically ruled out.

The judgment in *X Holding BV* also fits this pattern:[19]

> Permanent establishments situated in another Member State and non-resident subsidiaries are not in a comparable situation with regard to the allocation of the power of taxation as provided for in an agreement such as the Double Taxation Agreement, and in particular in Articles 7(1) and 23(2) thereof. Whereas a

Weber, Most-Favoured-Nation Treatment under Tax Treaties Rejected in the European Community: Background and Analysis of the *D* Case, *Intertax* (2005): 440 et seq.; Cordewener & Reimer, The Future of Most-Favoured-Nation Treatment in EC Tax Law – Did the ECJ Pull the Emergency Brake without Real Need? – Part 2, *European Taxation* (2006): 291 et seq; Schuch, Critical Notes on the European Court of Justice's *D* Case Decision on Most-Favoured-Nation Treatment under Tax Treaties, *EC Tax Review* (2006): 6 et seq.

16. On this criticism, *see* Lang, *SWI* (2005): 370 et seq.; Weber, *Intertax* (2005): 441 et seq.; Fuchs, Status quo der Meistbegünstigung im Europäischen Steuerrecht, *ÖStZ* (2007): 35. Already in the past critical of a legal provision as a justification, Lang, "Die Bindung der Doppelbesteuerungsabkommen an die Grundfreiheiten des EU-Rechts", in *Doppelbesteuerungsabkommen und EU-Recht*, ed. Gassner, Lang, Lechner (Vienna: Linde Verlag, 1996), 30 et seq.
17. *See* Lang, *SWI* (2005): 370 et seq.; also Graaf & Janssen, *EC Tax Review* (2005): 182 et seq.; Kofler, *ÖStZ*: 2005, 432 et seq; Kofler & Schindler, *European Taxation* (2005): 534 et seq.; Cordewener & Reimer, *European Taxation* (2006): 293 et seq.; Kofler, Wer hat das Sagen im Steuerrecht – EuGH, *ÖStZ* (2006): 160; Calderón & Baez, *Intertax* (2009): 217; Lang, *EC Tax Review* (2009): 104.
18. ECJ May 20, 2008, *Orange European Smallcap Fund*, C-194/06, paragraphs 63 et seq.
19. ECJ Feb. 25, 2010, *X Holding BV*, C-337/08, paragraph 38.

> subsidiary, as an independent legal person, is subject to unlimited tax liability in the State party to such an agreement in which that subsidiary is established, the same does not apply in the case of a permanent establishment situated in another Member State, which remains in principle and in part subject to the fiscal jurisdiction of the Member State of origin.

The ECJ thus argued *on the basis of the specifically relevant agreement provisions* and *the national law regulations* why permanent establishments situated in another Member State and non-resident subsidiaries were not in a comparable situation *in this case*. This reasoning would be completely incomprehensible if one were to assume that the ECJ believes that foreign subsidiaries and foreign permanent establishments could never be in a comparable situation.

Interestingly enough, in *X Holding BV*, the ECJ also refers to its statements made in *Columbus Container*:[20]

> However, the Member State of origin remains at liberty to determine the conditions and level of taxation for different types of establishments chosen by national companies operating abroad, on condition that those companies are not treated in a manner that is discriminatory in comparison with comparable national establishments (Case C-298/05 Columbus Container Services [2007] ECR I 10451, paragraphs 51 and 53). As permanent establishments situated in another Member State and non-resident subsidiaries are not, as has been stated in paragraph 38 of the present judgment, in a comparable situation with regard to the allocation of the power of taxation, the Member State of origin is not obliged to apply the same tax scheme to non-resident subsidiaries as that which it applies to foreign permanent establishments.

In *Columbus Container* the ECJ – contrary to Advocate General in his opinion[21] – had not addressed horizontal comparability at all, something that some authors saw as evidence that the Court no longer regarded horizontal comparison pairing as admissible at all.[22] From this perspective, the assessment made by the ECJ in *Columbus Container* appears in a completely different light: If Cases *X Holding BV* and *Columbus Container* are to be considered coherent – and this is an attempt undertaken by the ECJ itself in its reasoning in *X Holding BV* –, it seems reasonable to interpret *Columbus Container* so as to mean that the ECJ did not generally assume the inadmissibility of horizontal comparison pairing, but in this case, too, did not deem – though only implicitly – that the regulations of the German external tax law applied in connection with the Belgian holding were comparable to DTA exemptions, to which profits of permanent establishments are otherwise usually subject to.

A confirmation of this line can be found in the judgment *Haribo* and *Österreichische Salinen*. In this case too, the ECJ had to deal with comparison pairing. The ECJ decided that:

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20. ECJ Feb. 25, 2010, *X Holding BV*, C-337/08, paragraph 40.
21. AG Mengozzi Mar. 29, 2007, *Columbus Container*, C-298/05.
22. *See* Gstöttner, Rs Columbus Container – Absage an die "Outbound-Meistbegünstigung"?, *Taxlex* (2008): 285 et seq.; Haslehner, *Das Betriebsstättendiskriminierungsverbot im Internationalen Steuerrecht* (Vienna: Linde Verlag, 2009), 147; Hohenwarter, *Verlustverwertung im Konzern* (Vienna: LexisNexis, 2009), 94 et seq. and 579 et seq.

> the different treatment of income from one non-member State compared to income from another non-member State is not concerned, as such,

by the free movement of capital.[23] On the one hand, the statement made by the ECJ is objectionable, since one would have expected the ECJ to reason why it generally rules out precisely those comparison pairs from the scope of application of the free movement of capital.[24] On the other hand, the Court thus implicitly confirmed its previous case law: When the ECJ describes a specific, precisely defined comparison pair as non-relevant, this indicates that the ECJ does *not generally* regard "horizontal" comparison pairing as inadmissible. In this statement, the Court definitely did not reject the comparison between income from a non-Member State to income from a Member State. On the contrary: In this particular judgment, the ECJ even explicitly applied the "horizontal" comparison pairing:[25]

> It follows that, by reason of the conditions laid down by the legislation at issue in the main proceedings in order for portfolio dividends from companies established in non-member States party to the EEA Agreement that are received by companies established in Austria to qualify for exemption from corporation tax in Austria, investment in the former companies which might be made by the latter is less attractive than investment which might be made in a company established in Austria *or another Member State*. Such a difference in treatment is liable to discourage companies established in Austria from acquiring shares in companies established in non-member States party to the EEA Agreement.

[C] Violation of Fundamental Freedoms in Case of Horizontal Comparability

Finally, one must not forget that the previous case law of the ECJ offers at least one example in which the ECJ used only a horizontal comparison pair – that is, managed without a vertical comparison pair – and eventually assumed a violation of a fundamental freedom:[26] In *CLT-UFA*, the ECJ compared German capital companies with a foreign parent company to German permanent establishments whose head office is situated abroad.[27]

This judgment was delivered in 2006 and thus during a period in which the ECJ otherwise sought to at least slightly reduce the rigidity of its earlier case law and be somewhat more obliging to the fiscal interests of the Member States by introducing more stringent measures in its comparability examination and through the "invention" of new justifications.[28] It is particularly evident that the ECJ not only leaves open the

23. ECJ Feb. 10, 2011, *Haribo und Österreichische Salinen*, C-436/08 and C-37/08, paragraph 48.
24. For more detail, *see* Lang, Jüngste Tendenzen zur "horizontalen" Vergleichbarkeitsprüfung in der steuerlichen Rechtsprechung des EuGH zu den Grundfreiheiten, *SWI* (2011): 160 et seq.
25. ECJ Feb. 10, 2011, *Haribo und Österreichische Salinen*, C-436/08 and C-37/08, paragraph 52 (emphasis added).
26. *See also* Hohenwarter, *Verlustverwertung*, 105 et seq., who is very critical of the justification of the ECJ.
27. ECJ Feb. 23, 2006, *CLT-UFA*, C-253/03, paragraph 30.
28. *See* Lang, Gemeinschaftsrechtliche Verpflichtung zur Rechtsformneutralität im Steuerrecht?, *IStR* (2006): 397 et seq.; *see* further Lang, "Eine Wende in der Rechtsprechung des EuGH zu den

possibility of horizontal comparison pairing but even makes it unmistakably clear that even a different treatment of cross-border constellations per se – i.e. without a discrimination of the foreign situation vis-à-vis the domestic situation – can result in the violation of a fundamental freedom.

§2.03 ANALYSIS OF THE *SOPORA* JUDGMENT

[A] The Opinion of Advocate General Kokott

The ECJ judgment in *Sopora* was based on the following national law regulations: Pursuant to Dutch tax law, reimbursements of expenses are exempt from the tax if they are granted in respect of expenses which a worker incurs by virtue of the fact that he is temporarily staying outside his State of origin, such as, for example, the costs of a second home or increased living costs, but also the costs of travel to an interview (known as extraterritorial expenses). If a Netherlands employer engages a worker who, at that time, lives outside the Netherlands, a flat-rate scheme is applicable in specific circumstances: Under that scheme, the employer's reimbursements of expenses are deemed, up to 30% of the taxable base for wages tax, to be reimbursement of extraterritorial expenses, without any need for detailed proof of the expenses to be produced. The production of proof for higher actual expenses remains possible. The flat-rate scheme applies only to foreign workers who have a particular expertise which is not available or is scarce on the Netherlands labor market. Moreover, from 2012 onwards, an additional condition was introduced, under which, in the previous two years, the worker must have resided for longer than two-thirds of that period at a distance of more than 150 kilometers, as the crow flies, from the Netherlands border.

In the case at issue, Mr. Sopora worked for a Dutch employer in the Netherlands in 2012. For the two years immediately prior to taking up his employment in the Netherlands, he had his place of residence in Germany, though at a distance of less than 150 kilometers from the Netherlands border. The Netherlands tax administration for that reason refused application of the flat-rate scheme in his case. Mr. Sopora lodged an objection to this on the ground, *inter alia*, that the refusal to apply the flat-rate scheme was contrary to EU law. By its three questions referred to the ECJ for a preliminary ruling, the Hoge Raad wanted in essence to ascertain whether a national rule which makes a tax advantage such as the flat-rate scheme here at issue dependent on a rule such as the 150-kilometer condition described above is compatible with freedom of movement for workers under Article 45 TFEU.

The opinion of Advocate General Kokott prepared the ground for the decision of the ECJ in *Sopora*. Advocate General Kokott pointed out that the Dutch Government indirectly distinguishes between nationals of different Member States:[29]

direkten Steuern?", in *Aktuelle Entwicklungsaspekte der Unternehmensbesteuerung, Festschrift Wacker*, ed. Hebig, Kaiser, Koschmieder, Oblau (Berlin-Tiergarten: Erich Schmidt Verlag GmbH & Co KG, 2006), 365 et seq.

29. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 19.

> It places certain non-residents at a disadvantage vis-à-vis other non-residents. Only workers who have a place of residence in Belgium, Germany, France, Luxembourg or England can fail to meet the 150-kilometre condition on geographical grounds, whereas workers with a place of residence in other Member States will always satisfy it. As a result, even all workers who are resident in Belgium are likely to be excluded from the flat-rate scheme.

Advocate General Kokott then addressed the issue of horizontal comparability:[30]

> The distinctive feature of the present case consists only in the fact that the Member State concerned does not – unlike the situation usually examined by the Court – disadvantage non-residents vis-à-vis residents. In the present case, residents who are likewise employed by a Netherlands employer are not, from the outset, entitled to claim any extraterritorial expenses in the context of the wages tax scheme examined here. In addition, under the flat-rate scheme, Netherlands residents who work outside that Member State cannot have recourse to that scheme. Less favourable treatment therefore exists only for residents of certain Member States vis-à-vis residents of other Member States.

She then referred to the broader wording of the free movement of workers, which does not preclude the assumption of a horizontal comparison pairing, and addressed the previous case law as an example:

> The Court has nevertheless, with regard to the question whether the fundamental freedoms also prohibit differentiation between nationals of different Member States, up to now given varying signals. On the one hand, in the judgment in Columbus Container Services, it rejected the view that unequal treatment depending on the Member State of establishment alone constitutes an impairment of freedom of establishment under Article 49 TFEU [...]. In holding that there was no restriction on that freedom, the Court rather emphasised, on the contrary, that there was equal treatment of the cross-border situation examined with the national situation [...]. Moreover, with regard to free movement of capital under Article 63(1) TFEU, which also includes third countries, the Court does not view the differing treatment of capital gains, depending on the third country in which they originate, as falling under the protection of that provision. [...]. On the other hand, also in the context of free movement of capital, in the judgment in Orange European Smallcap Fund, the Court found an impairment of the fundamental freedom by reason of the unequal treatment of various other Member States by the State of origin [...]. Accordingly, in further decisions, both in the context of free movement of capital and in that of freedom of establishment, the Court has at least examined whether the differing treatment of various non-residents constitutes an impairment of the fundamental freedom in the specific case in question [...].

Finally, she clearly took a position:[31]

> I am of the view that freedom of movement for workers prohibits in principle not only adverse unequal treatment of non-residents vis-à-vis residents, but also differentiation between non-residents of different Member States. [...] In that respect, I concur with Advocates General Léger and Mengozzi, who, in regard to freedom of establishment, have already pointed out that it would be contrary to the

30. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 20.
31. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 27 et seq.

> notion of the "single market" [...] and that there would be the "risk of fragmentation of the common market", [...] if a difference in the treatment of the establishment of companies depending on the Member State were to be allowed. A comparable result with regard to freedom of movement for workers would be liable to occur if the Member States were allowed to give preference to workers from certain Member States over workers from other Member States. Under Article 26(2) TFEU, the internal market is to comprise an "area without internal frontiers." That objective can be attained only if all workers in the European Union are treated equally. Any differentiation between workers on the basis of their State of origin erects new borders even if no foreign worker is placed in a position which is inferior to that of national workers. That is because support for workers from only certain Member States automatically worsens the conditions of competition for workers from the other Member States. In that respect, the internal market may also be impaired by a scheme such as the one at issue here, which in itself promotes the free movement of workers within the European Union.

This set the course for applying the traditional examination pattern to this constellation as well:[32]

> A tax advantage such as that provided by the Netherlands, which makes recourse to it dependent on the worker's foreign place of residence being at a certain distance from the national border, therefore impairs freedom of movement for workers. Such an impairment is permissible only if it applies to situations which are not objectively comparable to each other [...], or if it is justified by an overriding reason in the public interest [...].

With regard to comparability, she maintained[33] that the:

> extraterritorial expenses are, in particular, different only in degree if the situations of workers who live at a distance only slightly more or less than 150 kilometres from the Netherlands border respectively are compared. Whether, despite the great similarity of those two groups, a differentiation on the basis of a rigid limit of 150 kilometres is permissible can be adequately assessed only if the proportionality of such a demarcation can also be assessed in the context of the examination of a justification for the impairment of freedom of movement for workers. [...] The impairment of freedom of movement for workers at issue here therefore applies to situations which are objectively comparable with one other.

The Commission – and, interestingly enough, not the Dutch Government – cited the combating of tax evasion as constituting a ground of justification.[34] In the Commission's view, the 150-kilometer condition prevents tax avoidance because it prevents, in principle, an unreasonable estimate of expenses for workers who live at a distance of less than 150 kilometers from the Netherlands border. Advocate General Kokott – not really surprisingly – immediately rejected this argument:[35]

> According to settled case-law, the aim of preventing tax avoidance may indeed justify a national scheme where it relates specifically to purely artificial arrangements designed to avoid application of the tax provisions of the Member State

32. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 30.
33. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 33 et seq.
34. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 38.
35. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 39-40.

> concerned [...] In the present case, however, no tax avoidance can be identified in the situation where a worker who lives at a distance of less than 150 kilometres from the Netherlands border has recourse to the flat-rate scheme. It is not clear what factual situation a worker such as Mr Sopora is creating purely artificially in this context. In particular, he also does not claim that he incurs any specific amount of extraterritorial expenses, but merely wishes, like other workers, to have recourse to a flat-rate scheme which is applicable precisely irrespective of the actual amount of the expenses.

Advocate General Kokott was somehow skeptical toward the justification of preventing competitive disadvantages for national workers put forward by the Dutch Government:[36]

> The prevention of distortions of competition may, in principle, be regarded as an overriding reason in the public interest. [...] However, irrespective of whether the avoidance of disadvantages for *national* workers may also be a justification for treating workers from other Member States differently according to their State of origin, it is not apparent in the present case, according to the legal situation as described, that the 150-kilometre condition is necessary in order to attain that objective. The flat-rate scheme, namely, applies, according to the information supplied by the national court, only in the case where no adequate alternative for the post in question can be found in the Netherlands labour market [...]. If the Netherlands labour market is understood to mean the workers resident in the Netherlands, the flat-rate scheme should not, in any case, substantially affect competition between resident and non-resident workers by virtue of that condition.

On her own accord, however – that is, without this being put forward by the Commission or a government –, Advocate General Kokott maintained that:

> the aspect of prevention of distortions of competition may also be of importance in another form in the present case [...]. The 150-kilometre condition serves the – prima facie – understandable purpose of not granting the benefit of the flat-rate scheme in cases where a worker is able to commute from his foreign place of residence to his place of work in the Netherlands and therefore incurs no, or only low, extraterritorial expenses because, in particular, he does not require a second home in the Netherlands. It is thus sought to adapt the tax exemption for the employer's reimbursements in respect of his employee's extraterritorial expenses to the expenses actually incurred. [...] The differentiation therefore serves the aim of avoiding excessive advantages of the flat-rate scheme for certain workers and thus also of preventing distortions of competition within the group of non-resident workers. That aim can, in principle, be regarded as an overriding reason in the public interest.[37]

Advocate General Kokott subsequently differentiates between "appropriateness"[38] and "proportionality":[39] The assumption made by the Dutch legislators that if the place of residence of a worker is less than 150 kilometers from the border the worker in the Netherlands will not maintain a second home and will therefore incur

36. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 42-43.
37. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 45 et seq.
38. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 48 et seq.
39. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 51 et seq.

lower extraterritorial expenses is considered by the Advocate General appropriate as a simplifying rule to achieve the legitimate aim – of preventing distortions of competition within the group of non-resident workers. As a result, those non-resident workers are excluded from the flat-rate scheme who do not maintain a second home in the Netherlands and therefore have lower extraterritorial expenses.

Advocate General Kokott, however, voiced doubts as to whether the 150-kilometer condition is proportionate.[40] That is because the scheme clearly also excludes from the flat-rate scheme such workers who cannot commute daily to their place of work and therefore need to maintain a second home in the Netherlands because, although the distance from their place of residence to the Netherlands border is indeed less than 150 kilometers, the distance to their place of work in the Netherlands is much greater. After all, the Netherlands – a fact to which the Advocate General pointed out to[41] – measures approximately 300 kilometers from north to south and approximately 180 kilometers from west to east. Advocate General Kokott considered it permissible:

> for a national legislature, for the sake of simplicity, to determine as decisive a more easily verifiable distinguishing criterion instead of a factual situation which is more difficult to ascertain. [...] In the present case, an alternative scheme, under which it has to be ascertained separately in each of a multitude of cases whether a non-resident worker actually maintains and uses a second home in the Netherlands, would involve an increased administrative burden both for the worker and for the tax administration. In addition, such a scheme would also be difficult for the tax administration to monitor.[42]

The simplifying rule, however, must "lead essentially to the same result."[43] It cannot be required, in the case of a simplifying rule:

> that there must not be any cases in which the legislative assumption proves to be incorrect. [...] It is, on the contrary, part of the essence of a simplifying rule that there will also be cases in which the chosen distinguishing criterion does not reflect the desired factual situation. [...] However, the last-mentioned cases ought to be merely isolated cases. The criterion chosen in the context of a simplification must, as a rule, reflect a correct understanding of the factual situation. A simplifying rule is therefore, in principle, proportionate only if it leads, in the vast majority of cases, to the same result as would have been achieved without the simplification.[44]

The Advocate General obviously demands an empirical analysis from the national court as to the number of cases in which the Dutch requirement results in taxpayers being excluded from the flat-rate rule who must not commute daily from their place of residence to their place of work and must therefore maintain a second residence in the Netherlands.

40. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 56.
41. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 57.
42. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 52.
43. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 53.
44. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 54-55.

For Advocate General Kokott, however, the proportionality of the Dutch regulation is also important from a different point of view: She took exception to the fact that non-resident workers close to the border cannot use a flat-rate rule at all, although the "gentler means" of lowering the flat-rate rule to a lower percentage would have been available to Dutch legislators in these cases.[45] Once again, she obviously demands an empirical analysis from the national court:[46]

> The refusal of such a reduced flat-rate scheme for non-resident workers living close to the border would be proportionate only if the vast majority of such workers essentially incurred no extraterritorial expenses at all.

[B] The ECJ Judgment

As it is often the case, the reasoning of the ECJ judgment is significantly shorter than the one in the opinion of the Advocate General. Nor is the decision of the Court as clearly structured as the opinion, which distinguishes precisely between the individual steps of the analysis scheme for the fundamental freedoms. In any event, the ECJ – like Advocate General Kokott before it – is unmistakably in favor of the horizontal comparison pairing:[47]

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

The ECJ judgment also contains the following references to the specific comparison pairs:[48]

> Workers who do not satisfy the condition of residence at a distance of more than 150 kilometres from the Netherlands border may, on production of appropriate proof, be entitled to an exemption for extraterritorial expenses actually incurred under Dutch law. However, that scenario does not permit any overcompensation in respect of those expenses, unlike the situations in which the flat-rate tax exemption is applied, the latter being granted irrespective of the actual amount of the extraterritorial expenses and even where the amount of those expenses is nil.

The ECJ distinguishes between the differently treated situations as follows:[49]

> It thus appears that all non-resident workers, whether they live more, or less, than 150 kilometres from the Netherlands border, may benefit from a tax exemption for reimbursement of actual extraterritorial expenses. The administrative simplification of the claim for those extraterritorial expenses resulting from the benefit of the

45. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 60.
46. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 61.
47. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 25.
48. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 29.
49. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraphs 30-31.

> flat-rate rule is, however, reserved for workers who live at a distance of more than 150 kilometres from that border. [...] It is also common ground that most Belgian workers and some German, French, Luxembourgish and United Kingdom workers are thus excluded from the benefit of the flat-rate rule.

On a justification level, the ECJ then reflects on the following:[50]

> While it is true that considerations of an administrative nature cannot justify a derogation by a Member State from the rules of EU law [...], it is also clear from the Court's case-law that Member States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities [...].

The ECJ draws the following conclusion for the specific constellation:[51]

> The mere fact that limits are set concerning the distance in relation to the workers' place of residence and concerning the ceiling of the exemption granted, taking as the starting point the Netherlands border and the taxable base, respectively, even though, as the referring court states, this is necessarily approximate in nature, cannot therefore, in itself, amount to indirect discrimination or an impediment to the free movement of workers. This is *a fortiori* so where, as in the present case, the flat-rate rule operates in favour of the workers who benefit from it, in that it reduces significantly the administrative steps which those workers must undertake in order to obtain the exemption for the reimbursement of extraterritorial expenses.

The limitation subsequently made by the ECJ is decisive:[52]

> The position would, however, be different if – and this is a matter for the referring court to ascertain – those limits were set in such a way that the flat-rate rule were systematically to give rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

The ECJ thus distinguishes between an – admissible – administrative simplification and an – inadmissible – preferential treatment of the workers living outside the 150-kilometre zone which would apply if the regulation "were systematically to give rise to a net overcompensation" of the expenses actually incurred.

[C] The Standards Established by the ECJ for Horizontal Comparability

The ECJ followed the opinion of its Advocate General because it also made it unmistakably clear that the fundamental freedoms do not protect against an unjustified worse treatment of the foreign situation vis-à-vis the domestic situation but also allow the discrimination of certain cross-border situations compared to other cross-border situations. Advocate General Kokott and the ECJ referred in particular to the wording of Article 45 paragraph 2 TFEU. It would be premature, however, to assume that horizontal comparability is only relevant with regard to freedom of movement for

50. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 33.
51. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 34.
52. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 35.

workers. Despite the different wording of the various fundamental freedoms, the case law of the ECJ generally seeks to establish common standards in their application.[53] In this particular case, both the Advocate General and the ECJ pointed out to Article 26 TFEU which defines the objective of the establishment of the internal market and is therefore of significance not only for the interpretation of a single fundamental freedom.[54] In its opinion, Advocate General Kokott also expressly mentions the previous case law on the freedom of establishment and the free movement of capital, based on which the ECJ has already examined the different treatment of various non-residents in relation to these fundamental freedoms in the past.[55]

It appears that neither the Advocate General nor the ECJ applied different standards than usual in their examination of comparability. The reasoning in the opinion and in the judgment are slightly different, but that does not constitute a particularity of horizontal comparability: The defining factor for Advocate General Kokott was that the extraterritorial expenses are "different only in degree" if the situations of workers "who live at a distance only slightly more or less than 150 kilometers from the Netherlands border respectively" are compared. This "great similarity of those two groups" motivated the Advocate General to accept comparability, so as to eventually subject the "differentiation on the basis of a rigid limit of 150 kilometres" to a proportionality assessment.[56] For the ECJ, on the other hand, the objective pursued by the Dutch regulation is likely to have been the decisive factor:[57] The objective pursued by the legislators was that of:

> facilitating the free movement of workers residing in other Member States who have accepted employment in the Netherlands and who are, by virtue of that fact, liable to incur additional expenses.

This obviously prompted the ECJ to regard these non-resident workers as comparable – irrespective of whether they live inside or outside the 150-kilometer zone.

On the reasoning level, the simplification consideration alone was decisive for the ECJ. The Member States have the possibility of attaining legitimate objectives through

53. *See* in detail Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Köln: Dr. Otto Schmidt KG, 2002), 103 ff; Vanistendael, "A Comparative and Economic Approach to Equality in European Taxation", in *Körperschaftsteuer – Internationales Steuerrecht – Doppelbesteuerungsabkommen, FS Wassermeyer*, ed. Gocke, Gosch, Lang (München: Verlag C.H. Beck, 2005), 534; Loukota, *EG-Grundfreiheiten und beschränkte Steuerpflicht* (Vienna: Linde Verlag, 2006), 58 et seq.; Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Vienna: Linde Verlag, 2007), 46 with further references in fn. 76; Terra & Wattel, *European Tax Law*, 5th ed. (London: Kluwer Law International, 2008), 63 et seq.; Haslehner, *Das Betriebstättendiskriminierungsverbot*, 108; Reimer in *Europäisches Steuerrecht, Chapter 7*, ed. Schaumburg & Englisch (Köln: Dr. Otto Schmidt KG, 2015), paragraph 7.35.
54. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 29; ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 26.
55. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 26; with reference to ECJ May 20, 2008, *Orange European Smallcap Fund*, C-194/06, paragraph 56 as well as to ECJ Jul. 5, 2005, *D*, C-376/03, paragraphs 53-63 and to ECJ Dec. 12, 2006, *Test Claimants in Class IV of the ACT Group Litigation*, C-374/04, paragraphs 82-83.
56. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 33.
57. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 26.

the introduction of rules which are easily managed and supervised by the competent authorities. For the ECJ, the fact that the scope of application of the rule depends on the distance of the place of residence from the border and the taxable base for wages tax was not objectionable "as such."[58] The Court accepted that "this is necessarily approximate in nature," especially considering that the taxpayers also benefit from the simplification in that it "reduces significantly the administrative steps" which they must take. These statements fit into the case law trend. The case law on liquidity disadvantages illustrates this:[59] Whereas in *Hoechst und Metallgesellschaft* the Court still applied a very stringent standard and did not even accept liquidity disadvantages in comparable situations,[60] it noticeably diluted this case law, for instance, in *Lidl Belgium*.[61] Similarly, in *N.*, the ECJ accepted the obligation for the filing of a tax return upon the change of residence,[62] and in *Truck Center* the levying of withholding tax on payments to non-residents.[63] Therefore, it is not surprising that in *Sopora*, the ECJ also accepts that "this is necessarily approximate in nature" though it may have a negative impact on some taxpayers.

According to the ECJ, the simplification consideration does not justify the different treatment if the flat-rate rule were "systematically to give rise to a net overcompensation in respect of the expenses actually incurred." It is for the referring court to ascertain this. Here, the ECJ obviously chose a different approach than the one suggested by its Advocate General: In her opinion, Advocate General Kokott clearly argued in favor of an empirical analysis: She required an examination as to whether "in the vast majority of cases" the flat-rate rule based on the 150-kilometer criterion covers those constellations in which workers are not able to commute daily to their place of work in the Netherlands and must therefore maintain a second residence there.[64] Moreover, the refusal of such a reduced flat-rate scheme for non-resident workers living close to the border would be proportionate only "if the vast majority of such workers" essentially incurred no extraterritorial expenses at all.[65] According to the Advocate General, this question must be considered by the referring court also or even exclusively on the basis of the "facts."[66] In my opinion, this approach is not convincing enough: On the one hand, the question arises as to whether the referring court was capable of carrying out an investigation that would have to include the situation of all eligible taxpayers. Moreover, these findings may change over time. If, for instance, the labor market situation in certain regions of the Netherlands were to deteriorate dramatically, an initially large number of taxpayers who commute more than 150 kilometers from another Member State's region close to the border to their place of

58. ECJ Feb. 24, 2015, *Sopora*, C-512/13, paragraph 34.
59. Lang, *EC Tax Review* (2009): 98 et seq.
60. ECJ Mar. 8, 2001, *Metallgesellschaft ua*, C-397/98, paragraphs 43 et seq.
61. ECJ Sep. 19, 2006, *Lidl Belgium*, C-414/06, paragraph 47.
62. ECJ Sep. 7, 2006, *N.*, C-470/04, paragraphs 49-50.
63. ECJ Dec. 22, 2008, *Truck Center*, C-282/07, paragraphs 46 et seq.
64. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraphs 55 et seq.
65. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 61.
66. AG Kokott Nov. 13, 2014, *Sopora*, C-512/13, paragraph 61.

work in the Netherlands and must therefore, as a rule, maintain a second residence there, would decline significantly, so that a rule initially not covering the "vast majority of cases" would then meet this requirement. Developments may, however, take the opposite direction, so that a rule originally compatible with Union law could end up being contrary to Union law as a result of a change in the labor market situation. Such considerations based on the number of cases are always problematic, since it is the nature of general-abstract standards that nobody can a priori estimate the number of taxpayers to which a certain rule will apply and how many will be affected by it.

The ECJ, on the other hand, has chosen a different approach: The Court assumes that the Dutch requirement would violate the freedom of movement for workers if:

> those limits were set in such a way that the flat-rate rule were systematically to give rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

This indicates that the ECJ does not take into account the number of cases covered by the rule as compared to the number of cases not covered by the rule: on the contrary, it focuses on the content of the requirement. The decisive factor is whether the application requirements and the legal consequences are defined in a manner that "systematically" gives rise to an overcompensation. Considering that the rule does not foresee a "cap," the question does actually arise as to whether it does "systematically" lead to overcompensation, at least for higher-income earners. To cite an example used by Meussen:[67] When a taxpayer with an annual income of EUR 5 million can receive an amount of EUR 1.5 million tax-free as a flat-rate reimbursement, the overcompensation caused by this rule is palpable. The actual costs incurred by a second residence or otherwise by the distance between the place of residence and the place of work, would not necessarily increase proportionally to the income, at least not without a limit. In view of these considerations, one must also ask the critical question whether the ECJ itself were not able to judge if a rule like the Dutch one "systematically" gives rise to overcompensation. If one takes the distribution of jurisdictions between the ECJ and the national court seriously, however, it is only logical that the ECJ leaves it to the referring court to assess the contents and the impact of the national requirement.

The criticism that one can bring forward against some details of the decision in *Sopora* is within the usual range. This has nothing to do with the fact that this is a case of horizontal comparability. On the contrary: the ECJ obviously applied the same standards as in the cases of vertical comparability. In the meantime, the case law of the ECJ has grown so extensive and diversified that contradictions between certain judgments cannot be avoided. In those areas in which the ECJ decided to go in a somehow different direction in its case law – for instance, by diluting the standards of proportionality in favor of the Member States –, *Sopora* corresponds to those trends that can equally be found in recent case law in instances of vertical comparability.

67. Meussen, Horizontal Discrimination and EU Law: The Sopora Case, *European Taxation* (2014): 322.

§2.04 CONCLUDING SUMMARY

It is by no means surprising when the ECJ now compares two cross-border situations with each other in *Sopora*. This definitely does not represent a change in the trend. On the contrary, the ECJ has always made it clear that it also considers the horizontal comparison pairing in addition to the vertical one. In view of the objectives of the fundamental freedoms, anything else would be completely incomprehensible: Differing regulations for nationals and foreigners and for domestic and cross-border situations are just as incompatible with the envisaged establishment of the internal market as the discrimination of certain EU residents vis-à-vis other EU residents or the worse treatment of investments from certain EU Member States compared to those from other Member States. The "risk of fragmentation of the common market" is equally present in these constellations.[68] Therefore, all these differentiations can only be assessed using the same standards and, where appropriate, be accepted as admissible or be rejected as inadmissible.[69]

The judgment in *Sopora* does not in any way signify that in future the ECJ will seek to identify a horizontal comparison pair in each of its judgments. The fact that even different cross-border constellations can be regarded as comparable does not mean that national legislators have no room to foresee differentiating rules for cross-border situations. Moreover, residents and non-residents – in the same way as residents with domestic and foreign income – are by no means generally and always in a comparable situation. In *Avoir Fiscal, Royal Bank of Scotland, Saint-Gobain* and several other judgments delivered ever since, the ECJ assumed comparability only when the relevant regulations – with the exception of the provision causing the discrimination – were identical.[70] In *Schumacker* and other judgments, the ECJ relied on the factual situation – though not very convincingly[71] – and only considered comparability when residents and non-residents were in a de facto comparable situation.[72] Yet on no account did the ECJ a priori *generally* regarded residents and

68. *See* the convincing opinions of AG Mengozzi, Mar. 29, 2007, *Columbus Container*, C-298/05, paragraph 117 and AG Légere May 2, 2006, *Cadbury Schweppes*, C-196/04, paragraphs 78 et seq.
69. With a different opinion *see* Hohenwarter, *Verlustverwertung*, 112, who wants the ECJ to reflect back to the vertical alignment of the fundamental freedoms.
70. ECJ Jan. 28, 1986, *Commission v. France* ("Avoir Fiscal"), C-270/83, paragraphs 19-20; ECJ Apr. 29, 1999, *Royal Bank of Scotland*, C-311/97, paragraphs 26 et seq.; ECJ Sep. 21, 1999, *Saint-Gobain*, C-307/97, paragraph 48. Regarding legal comparability, see, *e.g.*, ECJ Dec. 12, 2006, *ACT Group Litigation*, C-374/04, paragraphs 68 et seq.; ECJ Dec. 14, 2006, *Denkavit Internationaal and Denkavit France*, C-170/05, paragraphs 35.
71. *See* critical view of Wattel, Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice, *European Taxation* (2000): 210 et seq.; Cordewener, *Europäische Grundfreiheiten*, 493 et seq.; Mattson, Does the European Court of Justice Understand the Policy behind Tax Benefits Based on Personal and Family Circumstances?, *European Taxation* (2003): 188 et seq.; Lang, Ist die Schumacker-Rechtsprechung am Ende?, *RIW* (2005): 336 et seq.; Lang, *Die Rechtsprechung des EuGH zu den direkten Steuern* (Frankfurt on the Main/Vienna: Peter Lang International Academic Publishers, 2006), 44 et seq.; Lang, *EC Tax Review* (2009), 101 et seq.
72. ECJ Jan. 14, 1995, *Schumacker*, C-279/93, paragraph 36; in addition, ECJ Aug. 11, 1995, *Wielockx*, C-80/94, paragraph 18; ECJ Jun. 27, 1996, *Asscher*, C-107/94, paragraph 41; ECJ May

non-residents or residents with domestic and foreign income as comparable. Therefore, taxpayers who find themselves in different cross-border situations are by no means *automatically* and *generally* comparable with each other either. The comparability must always result from the legal or – if one adheres to the other, less convincing case law line of the ECJ – at least the factual situation of the specific case. In *Sopora*, the ECJ has now made it unmistakably clear that it equally considers both vertical and horizontal comparability tests in its analysis according to the fundamental freedoms. This leaves no room for a narrow view of the fundamental freedoms, according to which the discrimination of foreign situations vis-à-vis domestic situations is frowned upon, but the Member States are free to disadvantage taxpayers working across borders vis-à-vis other taxpayers working across borders at will.

16, 2000, *Zurstrassen*, C-87/99, paragraph 21; ECJ Jun. 12, 2003, *Gerritse*, C-234/01, paragraphs 43 et seq.; ECJ Jul. 1, 2004, *Wallentin*, C-169/03, paragraphs 15 et seq.