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Editorial XL

Sopora: *A Welcome Landmark Decision on Horizontal Comparison*

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1 Introduction

On 24 February 2015, the European Court of Justice's (ECJ) Grand Chamber handed down its decision in the *Sopora* case.[1] This case dealt with the Dutch 30% wage tax facility (in terms of the ECJ: flat-rate rule).[2] This optional allowance is open to foreign high-skilled expatiates who take up employment in the Netherlands. Basically, the allowance grants a fixed exemption of 30% of the employment income without the provision of further proof. The 30% exemption may be granted, even if that amount exceeds the extraterritorial expenses actually incurred. This can lead to overcompensation. However, it remains possible to produce proof of higher expenses incurred and to obtain an exemption for that reimbursement up to the amount of those expenses. If the 30% allowance cannot be invoked because the conditions are not satisfied, the expatriates' tax-free reimbursement is always limited to the demonstrable actual amount of the extraterritorial expenses. In such a situation an expatriate cannot benefit from the administrative simplification of the claim for those extraterritorial expenses. As from 2012, the scope of the 30% allowance has been restricted. Prior to their employment in the Netherlands, the expatriates must have had their residence outside a radius of 150 kilometres (km) from the Dutch border during two third of the period of twenty-four months prior to the start of their employment in the Netherlands in order to qualify for the allowance.[3] This means that the facility is in fact not open for Dutch nationals who, as a rule, have their residence within the Netherlands. Therefore, the facility tends to a reversed discrimination.[4] As a consequence, the main question did not deal with the issue of vertical discrimination, i.e., is a transnational situation treated worse than a domestic situation. The main question was one of horizontal discrimination: is differentiation allowed between non-residents, i.e., a less favourable tax treatment of a non-resident who has lived within the radius of 150 km compared to a resident who has lived outside that radius, taken into account that all other conditions in respect of the facility are satisfied.[5] If such a different treatment is inconsistent with EU law, a new window in the house of EU law is opened. The ECJ did do so in its landmark decision: the *Sopora* case. The question of this editorial is: should this decision be welcomed?

In this context, section 2 will develop a benchmark in order to answer this question. Section 3 discusses in more detail the Court's reasoning on horizontal comparison. Section 4 deals with question what the impact of the *Sopora* case may be on other fundamental freedoms than the free movement of workers which was the tested freedom in the case. Subsequently, section 5 raises the question of whether the case should have an impact on the ECJ's position on the most favoured nation (MFN) doctrine in the context of double tax conventions (DTCs). Section 6 draws the main conclusions.

2 Benchmark

In the author's view, the overall approach must be that the answer to the question must be based on the assessment of whether the decision contributes to the establishment of the internal market.[6] The analysis and evaluation should provide useful building blocks for further court decisions and/or for legislative acts of Member States legislatures.

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1 ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*).

2 See for a more detailed description of the facility, e.g., Daniël Smit, The 150km Requirement under the Dutch 30% Wage Tax Facility C-512/03 (*Sopora*), in *ECJ Recent Developments in Direct Taxation 2013* (Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, & Alfred Storck eds, Series on International Tax Law, volume 83, Linde Verlag Wien, Wien, Österreich 2014, pp. 132–134.

3 *See* Art. 10e(2)(b)(2°) Wage Tax Decree 1965 (in Dutch: *Uitvoeringsbesluit loonbelasting 1965*).

4 Compare also, e.g., Daniël Smit, *supra* n. 2, at 132.

5 *See* ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), para. 18. *See also*, F.P.G. Pötgens, Sopora: over horizontale discriminatie en overcompensatie, *NTFR Beschouwingen* 2015/4, p. 16.

6 *See* Art. 3 TEU and Arts 3(b) and 26 TFEU.

With regard to establishing the internal market, it should be noted that we are moving towards an internal market, but that we are not there yet.[7] This is illustrated by the fact that we still have twenty-eight tax jurisdictions within the European Union. The concept of 'the internal market' is reflected in the basic principle of 'an open market economy with free competition' mentioned in Articles 119 and 120 Treaty on the Functioning of the European Union (TFEU), on which the policy concerning the EMU and the Member States' and Union's economic policies must be based. An 'open market economy' means a market economy characterized by a liberal commercial policy. In this context, it is essential that the Court's decision contributes to improving tax neutrality, i.e., that it contributes to a level playing field, to application of the principle of equal treatment. The decision should contribute to optimizing the allocation of the production factors, labour and capital in order to improve the overall welfare, or maybe even wider, the overall wellbeing within the European Union. The concept of efficiency is based on the assumption that productivity will be highest when the production factors are distributed by a market mechanism without public interference or, at least, with as little interference as possible. Complete neutrality is probably not possible but, from an efficiency perspective, the highest possible level of neutrality should be pursued. Other values, like equity, may justify a deviation from these rules in specific situations.

In the author's view, tax neutrality is also in line with capital and labour import neutrality (CLIN) which is defined as follows: labour and capital funds originating in various States should compete on equal terms in the labour and capital markets of a state irrespective of the place of residence of the worker or investor. CLIN is generally regarded as fostering competitiveness, but the author believes that it also fosters efficiency. Since CLIN fosters not only competitiveness but also efficiency, it best satisfies the establishment of the internal market which is based on an open market economy with free competition.[8]

Tax neutrality and CLIN also imply adherence to a system of an origin state-based taxation. That is to say, income should be taxed only in the state where that income has been generated. This is because the public facilities provided by that state have contributed to the operation of the income–producing activities (direct benefit principle). In substance, the direct benefit principle is part of the ability to pay principle. The state where the income has been created, contributes to a person's wealth which gives him the ability to pay taxes. Therefore, an origin-based allocation of tax jurisdiction is in line with the ability to pay principle. An origin-based taxation justifies taxation of income by a state, if the income is created within the territory of that state, i.e., the cause of the income is within the territory of that state. That state makes the yield or the acquisition of wealth possible. Whereas the causal relationship between production of income and the territory of a state is predominant under the principle of origin, it is of minor or no importance under the principle of source. Therefore, the principle of origin and the principle of source are not necessarily identical. If the income is not generated in a state, but, nevertheless, physically appears to be from that state, tax jurisdiction may be allocated to that state on the basis of the principle of source, but not on the principle of origin. Based on the principle of origin, tax jurisdiction on income from employment is allocated to the state in which an employee carries out or has carried out his substantial employment activities. This is the state *in and from which* a person usually exercises or has exercised his employment activity. If an employee does not exercise substantial employment activities in another state than the state in and from which he usually exercises his employment activity, he cannot or can hardly be considered a competitor on the labour market of that other state. Expenses which are incurred for the purposes of substantial employment activities should be attributed to the substantial employment activity concerned and should be deductible regardless of where they were incurred.

In summary, tax neutrality and CLIN imply that income should be taxed only in the state to which that income can economically be linked. Therefore, creating a level playing field, tax neutrality, the ability to pay principle, and an origin-based allocation of tax jurisdiction go hand in hand and all four of these factors contribute to the establishment of the internal market of the European Union.

3 ECJ ACCEPTS HORIZONTAL COMPARISON NEXT TO VERTICAL COMPARISON

The reason for the introduction of the 150 km threshold was the fact that the 30% allowance had been used more widely than had been envisaged at the time of its

[7] *See* for a more detailed discussion, e.g., Eric C.C.M. Kemmeren, *Principle of Origin in Tax Conventions, A Rethinking of Models*, Dissertation PhD thesis Tilburg University, Eric C.C.M. Kemmeren/ Pijnenburg vormgevers•uitgevers, The Netherlands, Dongen (2001) pp. 35–45, 177–181 (also available on http:// webwijs.uvt.nl/publications/304239_ext.pdf), and Eric C.C.M. Kemmeren, *The Netherlands: What Are the Right Comparators under Article. 63 TFEU When Assessing a Dividend Withholding Tax Refund Claim? (Cases C-10/14* (Miljoen)*, C-14/14 (X), and C-17/14* (Société Générale), in *ECJ – Recent Developments in Direct Taxation 2014*, Series on International Tax Law, vol. 91 124-127 (Michael Lang et al. eds, Linde Verlag Wien, Wien, Österreich 2015).

[8] *See* for a more detailed discussion, e.g., Eric C.C.M. Kemmeren, *Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach*, Bull. Intl. Taxn. 438–443 (2006).

adoption.[9] This gave rise to a distortion of competition in the cross-border region to the detriment of workers resident in the Netherlands. Employers established in the Netherlands made greater use of workers residing outside the country, to whom they could pay a lower salary as a result of the 30% allowance, while at the same time ensuring that those workers would have a higher net income for the same work. The Dutch legislature wished to rectify that situation by excluding from the benefit of the allowance workers who could be assumed to incur limited, or even no, extraterritorial expenses inasmuch as they could travel each day from their place of residence to their place of work and back again. For that reason, the criterion based on a distance of 150 km as the crow flies between the worker's place of residence in another Member State and the Netherlands border was introduced. The Dutch legislature took the view that, beyond such a distance, a worker could not travel to and from his place of work on a daily basis. The legislature also held that taking into account the distance between the place of work in the Netherlands and the place where the worker resided in the other Member State prior to his recruitment in the Netherlands would have led to implementation problems for the tax authorities.

The main question was of whether the distinction made under Dutch national tax law between non-residents based on the 150 km criterion did constitute an indirect distinction on the basis of nationality or an impediment to the free movement of workers.[10]

3.1 The Court's Reasoning on Horizontal Comparison

The Court started with referring to its settled case law that the free movement of workers prohibits any discrimination based on nationality between workers of the Member States, both overt discrimination and all covert forms of discrimination.[11] Consequently, this freedom prohibits a Member State from adopting a measure which favours workers residing in its territory if that measure ultimately favours that Member State's own nationals, thereby giving rise to discrimination based on nationality. In order to establish whether direct discrimination arises, the Court compares the situation of a national with that of a non-national and in the context of whether indirect discrimination arises, it compares, e.g., the situation of a resident with that of a non-resident. These are cases of what is called vertical comparison.

Subsequently, the Court held that a second category must be distinguished next to the vertical comparison: horizontal comparison. It stated [italics and underlining added]:

> 25 Secondly, *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*.
> 26 Furthermore, the examination of the legislation at issue in the main proceedings must take account of the *objective* pursued by that legislation 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*, by making the benefit of the flat-rate rule available to those workers and not to workers who have been resident for a long time in the Netherlands.

It was also common ground that most Belgian workers and some German, French, Luxembourgish and United Kingdom workers were excluded from the benefit of the 30% allowance.[12] However, the mere fact of using limits 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, did not, in itself, amount to indirect discrimination or an impediment to the free movement of workers:[13]

> 35 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* [italics and underlining added].

3.2 Assessment of the Court's Reasoning on Horizontal Comparison

As far as the author knows, it is for the first time that the Court not only accepts a vertical comparison as standard to identify a forbidden discrimination or restriction under one of the fundamental freedoms, but also a horizontal comparison. The Court itself did not refer to

[9] *See*, e.g., ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), para. 15. *See also*, e.g., Memorandum in reply to the report (in Dutch: *Nota naar aanleiding van het verslag*), Second Chamber Documents (in Dutch: *Kamerstukken II*) 2011/12, 33 003, no. 10, pp. 66–74, Memorandum in reply (in Dutch: *Memorie van antwoord*), Senate Documents (in Dutch: *Kamerstukken I*) 2011/12, 33 003, D, pp. 22–25, and letter from State Secretary of Finance, Senate Documents 2011/12, 33 003, G, p. 7. *See* further also, e.g., H.J. Noordenbos, Wijziging 30%-regeling aanvechtbaar, *NTFR* 2011/2610 and Daniël Smit, *supra* n. 2, at 140–142.

[10] *See* ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), para. 18.

[11] *See* ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), paras 21–24.

[12] *See* ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), para. 31.

[13] *See* ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), paras 33–34. *See* for a different opinion Advocate General Kokott in her opinion of 13 Nov. 2014, Case C-512/13 (*Sopora*), para. 37 who held that the freedom of workers was only impaired by the 150km threshold.

any previous case law either.[14] The author believes that in the Court's reasoning, at least, two elements are essential and one is relevant in the given context for accepting the horizontal comparison. Essential are:

(1) The text of Article 45(2) TFEU.
(2) The establishment and functioning of the internal market as defined in Article 26 TFEU.[15]

Relevant is the objective of the Dutch rule which is to make a distinction between, on the one hand, residents of the Netherlands who are assumed not to make additional expenses when accepting employment in the Netherlands and, on the other hand, the group of non-residents who are liable to incur additional expenses, i.e., extraterritorial expenses.[16]

With this decision, the Court's Grand Chamber made a big step forward in respect of the further development of the internal market as meant in Article 26 TFEU, since it contributes to improving the level playing field for workers from other Member States than the Netherlands, i.e., to the open market economy with the free competition between workers of other Member States as meant in Arts 119 and 120 TFEU.[17] The Court allows Member States to make a distinction in their national laws between various categories of workers of other Member States,[18] but only within certain margins. This distinction is inconsistent with the free movement of workers if it results in a systematic distortion of the level playing field for these workers, i.e., with a systematic inconsistency with the principle of equal treatment. In the *Sopora* case, such a distortion will arise if the 30% allowance results in a systematic net overcompensation of the workers who can benefit from this allowance, because they had their residence outside a radius of 150 km from the Dutch border prior to the start of their employment in the Netherlands. Apparently, the Court accepts, at least for the moment, incidental and minor distortions of competition between various categories of workers of other Member States. Only if the economic effect of a national (tax) law of a Member State is clearly and structural detrimental to a certain category of workers from other Member States compared to another category of workers from other Member States, fair competition is hampered in such a manner that the establishment and functioning of the internal market is unacceptably hindered.[19] Therefore, one could argue, that although the ECJ made a big step, it made a cautious step at the same time.

Nevertheless, the author believes that the *Sopora* decision strengthens fair competition between the various categories of workers from other Member States than the Netherlands by giving access to the 30% allowance if this allowance leads to a systematic net overcompensation of extraterritorial expenses and that, in this context, it contributes to tax neutrality, CLIN, the application of ability to pay principle and an origin-based allocation of tax jurisdiction. The whole group of workers from other Member States active in the Dutch labour market can benefit from the same tax allowance included in the Dutch tax law if the character of this allowance is not really a compensation for actual extraterritorial expenses, but if it is in substance a wage subsidy to attract foreign high-skilled expatiates to the Netherlands. It should be noted that the 30% allowance is also meant to stimulate the investment climate in the Netherlands.[20] In such a situation, the principle of equal treatment and, as a consequence thereof, tax neutrality require that the allowance is available for all workers from other Member States. The 150 km threshold has no causal link with the aim of such a subsidy and, therefore, this threshold should have no bearing on granting the allowance. All high-skilled expatriates are equally interesting for the Dutch labour market, because it are the skills of these expatriates which are scarce in the Dutch labour market and this level of these skills does not depend on the distance of their residence to the Dutch border.[21] In case of a subsidy, there is no sufficient causal link, at least partly, with actual incurred extraterritorial expenses. Therefore, the allowance would not actually compensate a reduction of the ability to pay as consequence of incurred expenses for producing employment income in the Netherlands. The allowance would just be an additional compensation for the substantial employment carried out in the Netherlands. Therefore, from the perspective of the ability to pay principle, the direct benefit principle and an origin-based allocation of tax jurisdiction, the 30% allowance with a wage subsidy character should be available for all

[14] *See also*, e.g., F.P.G. Pötgens, *supra* n. 5, at 16. Compare also, e.g., Daniël Smit, *supra* n. 2, at 140 in the context of direct taxes. He referred to ECJ 12 Sep. 2006, Case C-300/04 (*Eman and Sevinger*), para. 57. He holds that a slight parallel could be drawn with this case in favour the argument that the Court already addressed horizontal comparison. *See* for a different opinion, e.g., C.G.A.C. de Graaf, *De invloed van het EG-recht op het internationaal belastingrecht: beleids- en marktintegratie*, Deventer: Kluwer, 2004, p. 117, and H.J. Noordenbos, *supra* n. 9 who refer to ECJ 20 May 2008, Case C-194/06 (*Orange European Smallcap Fund*), para. 56. According to Advocate General Kokott in her opinion of 13 Nov. 2014, Case C-512/13 (*Sopora*), paras 23–30, the Court has given varying signals. She also referred to, *inter alia*, ECJ 20 May 2008, Case C-194/06 (*Orange European Smallcap Fund*), para. 56. She concluded that the freedom of workers also prohibits differentiation between non-residents of different Member States.

[15] *See also*, e.g., F.P.G. Pötgens, *supra* n. 5, at 16–17.

[16] *Ibid.* at 18.

[17] Compare also, e.g., Advocate General Kokott in her opinion of 13 Nov. 2014, Case C-512/13 (*Sopora*), para. 29.

[18] Compare also, e.g., Daniël Smit, *supra* n. 2, at 143–144, who holds that an employee that meets the 150km-requirement and an employee that does not meet this requirement are, seen from the angle of the underlying objective of the 30% allowance, objectively incomparable.

[19] Compare, also, e.g., F.P.G. Pötgens, *supra* n. 5, at 19.

[20] *See*, e.g., Memorandum in reply to the report, Second Chamber Documents 2011/12, 33 003, no. 10, pp. 66–74, and *Hoge Raad* 9 Aug. 2013, no. 12/05577, BNB 2013/230, paras 3.3.5–3.3.6, which decision lead to ECJ's *Sopora* decision. *See also*, e.g., H.J. Noordenbos, *supra* n. 9.

[21] Compare also, e.g., H.J. Noordenbos, *supra* n. 9

workers from other Member States and not only for workers from other Member States who had their residence outside a radius of 150 km from the Dutch border prior to the start of their employment in the Netherlands.

On the other hand, it must be noted that, by widening the access to the 30% allowance in case it constitutes a wage subsidy to attract foreign high-skilled expatiates to the Netherlands, the aim of the Dutch legislature to reduce the distortion of competition in the cross-border region to the detriment of workers resident in the Netherlands, will not be realized. However, this reversed discrimination is still outside the scope of EU law.[22] The rectification of such situation is to be done by the Dutch legislator with another instrument than by excluding from the benefit of the allowance workers who had their residence outside a radius of 150 km from the Dutch border prior to the start of their employment in the Netherlands.

In summary, the extension of the comparability analysis to a horizontal comparison in the *Sopora* case must be welcomed from the perspective of contributing to the creation of a level playing field, tax neutrality, CLIN, the ability to pay principle, an origin-based allocation of tax jurisdiction and the establishment of the internal market.

4 Impact on other freedoms?

As mentioned, the ECJ made a big although cautious step in respect of the further development of the internal market. A question which arises, is whether the *Sopora* approach will or should also impact other fundamental freedoms than the free movement of workers?

Taking into account that the Court justifies the horizontal comparison with explicit reference to Article 26 TFEU, one may be inclined to believe that the *Sopora* decision is also relevant for the other fundamental freedoms. All freedoms contribute to the establishment and functioning of the internal market.[23] This idea may be further fuelled by the development in the Court's case law that shows that the fundamental freedoms convert more and more.[24]

On the other hand, the Court seems to refer to Article 26 TFEU only as a sort of background material and seems to put more emphasis on the text of Article 45(2) TFEU,[25] especially the words [italics and underling added]:

> the abolition of *any discrimination* based on nationality *between workers of the Member States*.[26]

The Court interprets these words as that they also prohibit:

> *discrimination between non-resident workers* if such discrimination leads to *nationals of certain Member States being unduly favoured in comparison with others*.[27]

As a consequence, the Court's reasoning seems to be hard to apply to Articles 49, 56, and 63 TFEU, because these provisions seems to lack language similar to Article 45(2) TFEU. Article 63 TFEU seems to offer most opportunities to apply the Sopora approach, because it prohibits:

> '*all restrictions* on the movement of capital all restrictions on the movement of capital *between Member States* and *between Member States and third countries* [. . .]' and
> '*all restrictions* on payments *between Member States* and *between Member States and third countries* [. . .]'[28]

However, the fundamental freedoms of establishment, the freedom to provide services, and the free movement of capital and payments contribute all at the same level to the establishment of the internal market. At least, Article 26(2) TFEU put the fundamental free movement of goods, the freedom of persons (including the freedom of workers and the freedom of establishment), the freedom to provide services and the free movement of capital on par level. As noted, the Court is manoeuvring cautiously. However, the author would like to call the Court to be as courageous in respect of the other fundamental freedoms as it was in respect of the freedom of workers. The adopted horizontal comparison in the context of the other freedoms will contribute to the establishment and functioning of the internal market in the same way as it does in the context of the freedom of workers. In the context of direct taxes, the application of a horizontal comparison to the other fundamental freedoms will also contribute to the creation of a level playing field, tax

[22] Compare also, e.g., Advocate General Kokott in her opinion of 13 Nov. 2014, Case C-512/13 (*Sopora*), para. 43. *See also*, Luc Hinnekens, Europese Unie en Directe Belastingen, *Grondslagen van het Fiscaal Recht*, Larcier, Gent, Belgium, pp. 339–340.

[23] Article 26(1)+(2) TFEU read as follows:

> '1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
> 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'

[24] *See also*, e.g., F.P.G. Pötgens, *supra* n. 5, at 17–18.

[25] *See also*, e.g., F.P.G. Pötgens, *supra* n. 5, at 17.

[26] Article 45(2) TFEU reads as follows:

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

[27] *See* ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), para. 25.

[28] Article 63 TFEU reads as follows:

> '1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
> 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

neutrality, CLIN, the ability to pay principle, and an origin-based allocation of tax jurisdiction.

A thing in common to Article 45(2) TFEU, the Court could find in Article 18 TFEU, which is a safety net provision, i.e., this provision is applicable if other fundamental freedoms cannot be applied.[29] This provision includes language similar to Article 45(2) TFEU [italics and underlining added]:

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, *any discrimination on grounds of nationality shall be prohibited*.

This wording 'read in the light of Article 26 TFEU' offers the Court the opportunity to interpret them as that they also prohibit discrimination between non-resident nationals if such discrimination based on a national (tax) law leads to nationals of certain Member States being unduly favoured in comparison with others.[30] However, the Court could avoid such an interpretation when it puts more emphasis on the words 'between workers of the Member States' included in Article 45(2) TFEU and, consequently, restricting the application of the horizontal comparison to the freedom of workers. However, in the author's view, such a restrictive interpretation does not match with the further development of the internal market.

In conclusion, the Court should be courageous and should apply the *Sopora* approach not only to the freedom of workers, but also to the other fundamental freedoms. Such a development would enhance the creation of a level playing field, tax neutrality, CLIN, the ability to pay principle, an origin-based allocation of tax jurisdiction and the establishment of the internal market of the EU. Especially Article 63 TFEU, but even more Article 18 TFEU offer good opportunities to open up more windows of horizontal comparison in the EU law building.

5 MFN UNDER DTCS REMAINS NOT APPLICABLE

On the other hand, the author does not believe that the *Sopora* case affects the Court's case law on the refusal to apply the MFN doctrine[31] in the context of double tax conventions (DTCs).[32] In the author's view, the Court was right to refuse the MFN under DTCs and should continue to do so as long as we have twenty-eight tax jurisdictions which are connected through bilateral DTCs.[33] As argued above, we are only moving towards an internal market. We are not there yet.

First of all, the MFN issue was not at stake in the *Sopora* case.

Secondly, it is hard to find case law in which the Court reveres implicitly its previous case law.

Thirdly, in the MFN case law, the comparison was made in the context of DTCs and as a consequence, non-residents of the contracting States are not comparable to residents of the contracting States.[34] Especially paragraph 61 of the *D.* case is illustrative [italics added]:

> The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person *resident in Belgium* is *not in the same situation* as a *taxable person resident outside Belgium* so far as concerns wealth tax on real property situated in the Netherlands.

A bilateral DTC is a package deal between two States. A DTC is a reflection of a financial balance between contracting States.[35] Each regular DTC provision is part of the reciprocal rights and obligations of the DTC as whole. Each provision is an integral part of a bilateral DTC. For a taxpayer, a DTC may contain sticks and carrots depending on his individual situation and the applicable national tax law. The whole DTC is applicable to taxpayers who are residents of the contracting States. They cannot cherry-pick, like non-resident taxpayers are aiming at when they want to rely on the MNF doctrine. The latter only want to apply a provision from the invoked DTC which is beneficial to them. Other provisions of that DTC which are detrimental to them

[29] *See also*, e.g., Ben J.M. Terra and Peter J. Wattel, European Tax Law, *Fiscale Handboeken*, volume 10, Kluwer, Deventer, The Netherlands 2012, pp. 39–40.

[30] Compare ECJ 24 Feb. 2015, Case C-512/13 (*Sopora*), para. 25.

[31] Under the MFN doctrine, if a state grants someone an advantage, it must automatically extend it to all its other partners. In such a situation, the most favourable treatment cannot only be claimed in the state of source, but also in the state of residence. *See*, e.g., Eric C.C.M. Kemmeren, Double Tax Conventions on Income and Capital and the EU: Past, Present and Future, 21 EC Tax Rev. 166 (2012).

[32] *See*, e.g., ECJ 5 Jul. 2005, Case C-376/03 (*D.*) and ECJ 12 Dec. 2006, Case 374/04 (*ACT GLO*). *See also*, e.g., F.P.G. Pötgens, *supra* n. 5, at p. 17, although more implicitly.

[33] *See* more elaborately, e.g., Eric C.C.M. Kemmeren, *Pending Cases Filed by Dutch Courts I: The Van Dijk and Bujura Cases*, in *ECJ Recent Developments in Direct Taxation* vol 13 (Michael Lang, Josef Schuch & Claus Staringer, EUCOTAX Series on European Taxation 244–260 (Kluwer Law International 2006). Others have strongly criticized the Court's refusal to apply the MFN doctrine. *See*, e.g., Otmar Thömmes, EG-Recht und Meistbegünstigung, *Internationale Wirtschafts-Briefe*, Fach 11a, pp. 701–702, G.T.K. Meussen, Exit Meestbegunstiging, *WFR* 2005/6633, pp. 1027–1028, Michael Lang, Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?, *SWI* 2005, pp. 365–375, Pasquale Pistone, *National Treatment for All Non-resident EU Nationals: Looking Beyond the D Decision*, 10 Intertax, 412–413 (2005), Dennis Weber, *Most-Favoured-Nation Treatment under Tax Treaties Rejected in the European Community: Background and Analysis of the D. Case*, 10 Intertax 429–445 (2005), Servaas van Thiel, *A Slip of the European Court in the D Case (C-376/03): Denial of the Most-Favoured-Nation Treatment because of Absence of Similarity*, 10 Intertax 454–457 (2005), Daniël Smit, *supra* n. 2, at 137–140.

[34] *See* e.g., ECJ 5 Jul. 2005, Case C-376/03 (*D.*), paras 53–63, and ECJ 12 Dec. 2006, Case 374/04 (*ACT GLO*), paras 81–91.

[35] *See also* ECJ 21 Sep. 1999, Case C-307/97 (*Saint-Gobain*), para. 60, and ECJ 15 Jan. 2002, Case C-55/00 (*Gottardo*), para. 36. *See also*, e.g., Eric C.C.M. Kemmeren, *Double Tax Conventions on Income and Capital and the EU: Past, Present and Future* 21 EC Tax Rev. 172–173 (2012).

compared to the rules which apply to them on a regular basis, are not invoked. If we already want to compare DTCs, we have to take into account the complete DTCs and not only separate provisions. Otherwise we compare situations, which are by their nature non-comparable. It is an inherent consequence of a bilateral DTC that, in general, its provisions only apply to residents of one of the two contracting States. The Court's conclusion that a resident of a contracting State is not in a comparable situation to a non-resident of that contracting State is therefore still persuasive.

If the MFN doctrine in the context of DTCs would be applied, the creation of more than 'white income' may be a result. For example, on the one hand, source state taxation on interest may be prevented, but on the other hand a tax sparing credit on the same interest may be claimed in the state of residence. Furthermore, an unlimited application of the MFN treatment would destroy the system of DTCs. The disruption of the equilibrium and reciprocity, which prevail in the system of DTCs, would be a possible implication. The author believes that such disruption would not contribute to the establishment of the internal market. On the contrary, MFN treatment would lead to cherry picking taxpayers. This result would not enhance a level playing field which is one of the characteristics of the internal market. Consequently, this cherry picking would also be inconsistent with tax neutrality and CLIN. The income would no longer be taxed in the State to which the income can economically be linked. Cherry picking would also be inconsistent with the ability to pay principle and the direct benefit principle, because the taxpayer claiming MFN treatment would no longer contribute to the public expenses in the State which made the acquisition of his wealth possible. Therefore, the application of the MFN doctrine would also set aside an origin-based allocation of tax jurisdiction.

To sum up: application of the MFN doctrine would not be consistent with the benchmark and not contribute to the establishment of the internal market. The *Sopora* decision does not and should not affect the Court's case law on the refusal of application of the MFN doctrine in the context of DTCs.

6 Conclusions

This editorial focussed on the question whether the *Sopora* decision should be welcomed. The Court decided that the freedom of workers also prohibits:

> discrimination between non-resident workers if such discrimination leads to nationals of certain Member States being unduly favoured in comparison with others.

Based on the developed benchmark the answer to this question must be in the affirmative.

The extension of the comparability analysis to a horizontal comparison in the *Sopora* case must be welcomed from the perspective of contributing to the creation of a level playing field, tax neutrality, CLIN, the ability to pay principle, an origin-based allocation of tax jurisdiction and the establishment of the internal market of the EU.

The Court should apply the Sopora approach not only to the freedom of workers, but also to the other fundamental freedoms. Such a development would satisfy the benchmark, especially the establishment of the internal market of the EU. Article 63 TFEU and Article 18 TFEU offer good opportunities to open up more windows of horizontal comparison in the EU law building.

Finally, application of the MFN doctrine in the context of DTCs would not be consistent with the benchmark and would not contribute to the establishment of the internal market. The *Sopora* decision does not and should not affect the Court's case law on the refusal of application of the MFN doctrine in this context.