

2016

Discriminatory Treatment of Migrant Workers in the European Union in the Form of Tax Legislation

Monica Babula

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

 Part of the [Law Commons](#)

Recommended Citation

Babula, Monica, "Discriminatory Treatment of Migrant Workers in the European Union in the Form of Tax Legislation" (2016). *Law School Student Scholarship*. 838.

https://scholarship.shu.edu/student_scholarship/838

**DISCRIMINATORY TREATMENT OF MIGRANT WORKERS IN THE EUROPEAN UNION IN THE
FORM OF TAX LEGISLATION**

BY MONICA BABULA

I. INTRODUCTION

On March 25, 1957, the European Economic Community Treaty was founded to create economic unity in order to prevent more turmoil between the European nations.¹ The European Economic Community evolved into the European Union (the EU) in 1993, adding foreign policy coordination and internal security.² Throughout the years, the EU has grown to encompass now twenty-eight Member States.³ Each State retains sovereignty, but must also abide by the current Treaty, the Treaty on the Functioning of the European Union (the TFEU).⁴ Although the Treaty encompasses many provisions, there is much that is not stated within it. Thus, European Union case law from the Court of Justice of the European Union (formerly the European Court of Justice) is used to fill in the blanks.

The following case analysis, examines discriminatory treatment of migrant workers in the European Union and the prohibitions and allowances under the fundamental freedoms, specifically the free movement of workers. Its purpose is to distinguish between prohibited and allowable discriminatory treatment of workers, including overt and covert discrimination, but more specifically discrimination of migrant workers in the tax context. To be precise, the term migrant worker as applied in this analysis refers to citizens of one of the twenty-eight Member States whom

¹ Treaty Establishing the European Economic Community, Mar. 25, 1957, Art. 2, 298 U.N.T.S. 11 [hereinafter EECT]. See ROGER GOEBEL ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 3 (2015).

² ROGER GOEBEL ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 3 (2015).

³ *Id.* at 17-19.

⁴ Consolidated Version of the Treaty on the Functioning of the European Union 2010 O.J. C 83/47 [hereinafter TFEU].

have chosen to work and/or move to another Member State for economic reasons. Additionally, the cases used in the analysis are based on an individual’s freedom of movement, rather than that of a company’s right of establishment.⁵

The analysis of existing case law will elaborate on the *Schumacker* principle, which takes into account whether a Member State considers an individual’s personal and family circumstances into the calculation of taxes, and whether under such considerations a migrant worker is discriminated against or whether there is simply an allowable discrepancy in tax legislation amongst Member States.⁶ The subsequent sections will elaborate on the cases leading up to *Schumacker*, address *Schumacker*, and then show the most recent case law applying the common understanding by the Court of Justice of the European Union (the CJEU) when deciding issues involving tax discrimination of migrant workers.⁷ The recent case law will show the Court of Justice moving farther away from harmonization of tax measures.

II. ARTICLE 45 OF THE TFEU

The prominent provision of Art 45 of the TFEU states that freedom of the movement of workers “shall entail the abolition of discrimination based on nationality between workers of the Member States” in regards to work and employment.⁸ Before further analysis begins on the discrimination that migrant workers face within the European Union, the term worker should first be defined. Such definition of the term is not provided for in the TFEU, however, case law establishes an understanding on what the term should mean.

⁵ TFEU, *supra* note 4, art. 45, 2010 O.J. C 83/47, at 66.

⁶ Case C-279/93, *Finanzamt Köln-Alstadt v. R. Schumacker*, 1995 E.C.R. I-225 (arguing that personal and family circumstances are to be taken into account in either the employment State or residence State).

⁷ The Court of Justice of the European Union was formerly known as the European Court of Justice.

⁸ TFEU, *supra* note 4, art. 45, 2010 O.J. C 83/47, at 66.

The Court of Justice has defined the term “worker” broadly, to be applied using a Community meaning rather than one interpreted by each Member State.⁹ The Court further defined the term using “objective criteria.”¹⁰ For Art 45 of the TFEU (former EECT Art 48) to apply, the criterion is “the existence of an employment relationship, regardless of the legal nature of that relationship and its purpose.”¹¹ The objective criteria are to “distinguish the employment relationship by reference to the rights and duties of the persons concerned.”¹² The essential factors used to distinguish an employment relationship are that “for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”¹³

The case of *Lawrie-Blum* specifically dealt with a British national who applied to a teacher-training program in Germany in order to become a German high school teacher.¹⁴ However, she was denied admission into the program because German law required applicants to be of German nationality for such a position.¹⁵ The Court determined that the applicant was considered a worker since she fulfilled the three essential factors.¹⁶

Thus, under such a broad approach, a student internship falls under the definition of a worker. In determining whether or not an individual may be categorized as a worker, neither the scope of employment nor the nature of the “legal relationship” between an employer and employee are relevant.¹⁷ In the context of *Lawrie-Blum*, educational services are not barred by TFEU Art 45

⁹ Case C-66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1986 E.C.R. I-2121, ¶ 14 (holding that a trainee teacher is a worker because for a certain period of time she performed services for and under the directions of another person in return for which she received remuneration).

¹⁰ *Id.* ¶ 14.

¹¹ *Id.* ¶ 15.

¹² *Id.* ¶ 17.

¹³ *Id.* ¶ 17.

¹⁴ Case C-66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1986 E.C.R. I-2121, ¶ 2.

¹⁵ *Id.*

¹⁶ *Id.* ¶ 18.

¹⁷ *Id.* ¶ 4.

(former EECT Art 48) just because they might not be inherently economic in nature.¹⁸ This definition is to be applied under all employment circumstances fulfilling the three essential factors held by the Court. Additionally, the Court determined that apprenticeships are not barred from the application of Art 45 (former EECT Art 48).¹⁹

The Community meaning of the term worker further emphasizes that part-time employment is not to be treated any differently than full-time employment in permitting migrant workers residency in other Member States.²⁰ The Court reasoned that although such part-time employment may not be enough to fulfill subsistence, it “constitutes for a large number of persons an effective means of improving their conditions.”²¹ Therefore, it follows that part-time workers who receive compensation below that of standard wages, are still to be considered a worker.²² The Court, however, also makes clear that only “effective and genuine” activities and not pursuit of “marginal or ancillary” activities are covered by part-time employment.²³ Finally, the Court also makes clear that an individual’s motive for pursuing employment is not to be considered.²⁴

The Court of Justice has further determined that employers, not just workers, have standing to bring claims under Art 45 TFEU (former EECT Art 48).²⁵ Not only is overt discrimination based on nationality prohibited, but so too are covert forms of discrimination.²⁶ Such an example involves requiring an individual who is a national of another Member State to reside in a particular Member State in order to qualify as a manager. Such a requirement would only be appropriate if

¹⁸ *Id.* ¶ 20.

¹⁹ Case C-66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1986 E.C.R. I-2121, ¶ 19.

²⁰ Case C-53/81, *Levin v. Staatssecretaris Van Justitie*, 1982 E.C.R. I-1035, ¶ 18 (holding that part-time employees are considered employees so long as they pursue effective and genuine activities).

²¹ *Id.* ¶ 15.

²² *Id.* ¶ 16.

²³ *Id.* ¶ 17.

²⁴ *Id.* ¶ 22.

²⁵ Case C-350/96, *Clean Car Auto Service v. Landeshauptmann Von Wien*, 1998 E.C.R. I-2521 (arguing that EECT Art 48 grants an employer standing and that a residence requirement constitutes covert discrimination).

²⁶ *Id.* ¶ 27.

it were used with “objective considerations independent of the nationality of the employees concerned and proportionate to a legitimate aim pursued by the national law.”²⁷

When it comes to military service, a number of the Member States compelled men to fulfill that duty, in the earlier years. In Germany, the law treated such time away for military service “as though it were employment for purposes of seniority and pension benefits.”²⁸ Thus, when the Court of Justice was tasked to determine whether such a law applied to a national of Italy working in Germany and serving his duty in Italy, the Court determined that such a law applies to non-nationals just as equally as it does to nationals of Germany.²⁹

Although it is established that an individual is a worker, in order to be eligible to invoke legal protection under the TFEU a natural person must also have a Member State nationality.³⁰ Once this important factor is realized, then that individual may rely on the fundamental freedoms provided for in the TFEU.³¹

Nonetheless, third-country nationals who are long-term residents also retain rights under the Council Directive 2003/109/EC of 25 November 2003.³² Specifically, third-country nationals who “reside[] legally in a Member State for a period of time to be determined and who hold[] a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.”³³ Under the Directive, eligible individuals benefit from equal treatment, such that of Member State nationals, in regards

²⁷ *Id.* ¶ 31.

²⁸ Case C-15/69, *Wurtembergische Milchverwertung v. Ugliola*, 1969 E.C.R. I-363 (holding that a migrant worker who interrupted his employment for purposes of serving military obligations in his national State is entitled to have that period taken into account for calculation of his seniority).

²⁹ *Id.* ¶ 7.

³⁰ Hanna Litwinczuk, *Taxation of Cross-Border Workers and EC Tax Law*, in 6 EATLP INTERNATIONAL TAX SERIES, TAXATION OF WORKERS IN EUROPE 71, 73 (Joerg Manfred Moessner ed., 2008).

³¹ *Id.*

³² Council Directive 2003/109/EC Concerning the Status of Third-Country Nationals who are Long Term Residents, 2004 O.J. L 16. [hereinafter Directive on Third-Country Nationals]. See also Litwinczuk, *supra* note 30, at 73.

³³ Directive on Third-Country Nationals, *supra* note 32, ¶ 2.

to tax benefits as well as other benefits.³⁴ But, to be clear, this applies *only* to those third-country nationals who have a “registered or usual place of residence” within the territory of a Member State.³⁵

The case of *Kamberaj* provides for an interpretation on the right to equal treatment under the Directive on Third-Country Nationals.³⁶ Mr. Kamberaj was an Albanian national residing and working in the Autonomous Province of Bolzano, where he received housing benefits.³⁷ However, in 2010 when he applied to renew his benefits his application was rejected because his funds as a third-country national had been exhausted.³⁸ In contrast, Italian nationals, and nationals of other Member States, in the same economic need would receive housing benefits under the same circumstances.³⁹ Thus, the Court concluded that so long as housing benefits fell amongst one of the rights guaranteed under the Directive, such a provision is discriminatory.⁴⁰ Accordingly, although the purpose of this case analysis focuses on discriminatory treatment of migrant workers that are citizens of the Member States, it is interesting to see the same application of law to third-country nationals.

III. SCOPE OF THE FREEDOM OF MOVEMENT FOR WORKERS

The scope of the free movement of workers under the TFEU generally does not apply to “internal situations or situations that do not involve a sufficient” level of foreign elements, as established by settled European Union case law.⁴¹ In essence, the fundamental freedoms do not

³⁴ Directive on Third-Country Nationals, *supra* note 32, art. 11(1).

³⁵ Directive on Third-Country Nationals, *supra* note 32, art. 11(2). *See also* Litwinczuk, *supra* note 30, at 74.

³⁶ Case C-571/10, *Servet Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, 2012 E.C.R. I-233 (holding that so long as housing benefits fell under the provisions granted by the Directive on Third-Country Nationals, a provision restricting the benefits to third-country nationals is discriminatory).

³⁷ *Id.* ¶¶ 31-32.

³⁸ *Id.* ¶ 33.

³⁹ *Id.* ¶ 71.

⁴⁰ *Id.* ¶ 93.

⁴¹ Litwinczuk, *supra* note 30, at 74, citing Case C-134/95 *USSL n 47 di Biella*, 1997 E.C.R. I-195, ¶19.

apply to situations involving a single Member State.⁴² The test for whether or not a case involves solely an internal situation has been more restrictive as cases have required the foreign element to consist of an economic scope.⁴³

In the Case of *Werner*, a German national was educated and practiced dentistry in Germany, but resided in the Netherlands.⁴⁴ German law at the time provided for special reliefs, such as a splitting tariff, to those who qualified for unlimited taxation, typically residents.⁴⁵ However, these advantages were not available to those subject to limited taxation, typically nonresidents.⁴⁶ The German government subjected Mr. Werner to limited taxation because he lived outside of the State and thus was considered a nonresident for tax purposes.⁴⁷ The issue was whether EECT Art 52 prohibits Member States from applying a heavier tax burden to its nationals who live outside their territory, but earn almost all of their income there.⁴⁸ The Court of Justice determined there was no cross-border element present to invoke the fundamental freedoms and therefore Germany was allowed to create a heavier tax burden for nationals who earned income in Germany but lived elsewhere.⁴⁹

Contrary to the decision in *Werner*, the Court in *Ritter* determined that a couple was eligible to invoke the fundamental freedoms under ECT Article 39 (former EECT 48), although the couple moved their place of residence to another Member State without exercising any economic

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Case C-112/91, *Hans Werner v Finanzamt Aachen-Innenstadt*, 1993 E.C.R. I-429, ¶ 5 (arguing that Member States are not precluded from imposing heavier tax burdens on their nationals because of the lack of a cross-border element).

⁴⁵ *Id.* ¶ 4. A splitting tariff allows a spouse who earns more income to attribute a portion of it to the other spouse in order to reduce their tax rate and thus pay less income tax.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 6.

⁴⁸ *Id.* ¶ 10.

⁴⁹ *Id.* ¶ 17.

activity.⁵⁰ In this case, the husband and wife were nationals of Germany, working as school teachers in Germany, but living in France.⁵¹ The German government assessed the couple's income tax, but refused to take account of their negative income derived from their use of their private home in France.⁵² Unlike in *Werner*, the Court here held that the appellants, "who worked in a Member State other than that of their actual place of residence," were covered under the scope of Art 48 EC (former EECT Art 48).⁵³ Thus, without an explanation, it would seem as though the Court overruled *Werner* in this case.⁵⁴ Therefore, it is unclear whether economic activity is actually a requirement by the Court or not, but as followed by case law to date it would seem to be overruled. Furthermore, critics such as Martin describe the holding in *Ritter*, although desirable, ultimately inconclusive without more.⁵⁵

Similar to the facts of *Ritter*, the Court recently held its decision in *Kieback*. Mr. Kieback was a German national, living in Germany where he personally owned his home, but worked in the Netherlands.⁵⁶ The Netherland tax authorities taxed Mr. Kieback without taking into consideration "the 'negative income' relating to his dwelling."⁵⁷ The only difference between this

⁵⁰ Case C-152/03, Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais v Finanzamt Germersheim, 2006 E.C.R. I-1711, ¶ 41 (holding that provisions denying individuals whom receive income in one Member State to have income losses in regards to their private dwelling in another Member State are invalid).

⁵¹ *Id.* ¶ 3.

⁵² *Id.* ¶ 7. "Negative income' is income derived from the use of immovable property which is taxable only in the State in which that property is situated, namely in France, under the agreement between France and Germany for the avoidance of double taxation." D. Martin, *Comments on Ritter-Coulais (Case C-152/03 of 21 February 2006) and Ioannidis (Case C-258/04 of 15 September 2005)*, in 8 EUROPEAN JOURNAL OF MIGRATION AND LAW 231 (2006).

⁵³ Case C-152/03, Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais v Finanzamt Germersheim, 2006 E.C.R. I-1711, ¶ 32.

⁵⁴ Litwinczuk, *supra* note 30, at 74 citing D. Martin, *Comments on Ritter-Coulais (Case C-152/03 of 21 February 2006) and Ioannidis (Case C-258/04 of 15 September 2005)*, in 8 EUROPEAN JOURNAL OF MIGRATION AND LAW 231, 235 (2006).

⁵⁵ D. Martin, *Comments on Ritter-Coulais (Case C-152/03 of 21 February 2006) and Ioannidis (Case C-258/04 of 15 September 2005)*, in 8 EUROPEAN JOURNAL OF MIGRATION AND LAW 231, 235 (2006).

⁵⁶ Case C-9/14, Staatssecretaris van Financiën v D. G. Kieback, 2015 EUR-Lex 406 (June 18, 2015), ¶ 9 (arguing that a Member State is allowed to deny a tax advantage under the *Schumacker* principle on the basis that the taxpayer's income did not form the major part of his income for the whole year in question).

⁵⁷ *Id.* ¶ 11.

case and *Ritter* was that Mr. Kieback left the Netherlands to work in the United States during the year of question.⁵⁸

Applying the *Schumacker* principle, the Court determined that “the Member State in which a taxpayer has received only part of his taxable income during the whole of the year at issue is therefore not bound to grant him the same advantages which it grants to its own residents.”⁵⁹ The Court also made clear that this interpretation was not affected because the taxpayer moved his employment from a Member State to a non-member State.⁶⁰

It is interesting to point out that in the most recent cases the Court of Justice is more apt to determine there is no discriminatory treatment of these migrant workers in the tax context. Moreover, in *Kieback* the Court argues that the taxpayer was not in a comparable situation as to residents of the Member State because he did not receive “all or almost all of his family income” in that Member State.”⁶¹ However, if that were the case then the new State would make the same argument and not grant the advantage. Thus, under the *Schumacker* principle, neither State would then take into account his personal and family obligations. Therefore, this case seems to be contrary to *Schumacker*, even though the taxpayer did move to a non-member State.

IV. DISCRIMINATION DEFINED

It is understood that “discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.”⁶² It is also said that “the principle of non-discrimination requires that comparable situations must not be treated

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 34.

⁶⁰ *Id.* ¶ 36.

⁶¹ *Id.* ¶ 34.

⁶² Litwinczuk, *supra* note 30, at 75 citing Case C-279/93, Finanzamt Köln-Altstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶ 30.

differently unless such treatment is objectively justified.”⁶³ In conjunction, a reasonable inference is that discrimination exists only when a comparable situation and different treatment are intertwined or vice versa.⁶⁴

Both direct discrimination based on nationality (overt discrimination) and different treatment under other circumstances that lead to the same result (covert discrimination) are prohibited.⁶⁵ Originally, it was thought that the difference in treatment based on tax residence was indirect (covert) discrimination because a majority of the non-residents are nationals of other Member States.⁶⁶

Discriminatory behavior amounts to more than just the basis of nationality.⁶⁷ It also exists when discrimination creates obstacles to cross-border activities, which “preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement.”⁶⁸ For instance, the *Bosman* case regarding the highly renown European football player made clear that “provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that even if they apply without regard to the nationality of the workers concerned.”⁶⁹

⁶³ Litwinczuk, *supra* note 30, at 75 citing Case C-403/03, *Schempp v. Finanzamt Munchen V*, 2005 E.C.R. I-6421, ¶ 28; Case C-354/95 *National Farmers’ Union and Others*, 1997 E.C.R. I-4559, ¶ 61.

⁶⁴ Litwinczuk, *supra* note 30, at 75.

⁶⁵ Case C-175/88, *Biehl v. Administration des Contributions*, 1990 E.C.R. I-1779, ¶ 13; *see also* Litwinczuk, *supra* note 30, at 75 citing Case C-152/73, *Sotgiu v. Deutsche Post*, 1974 E.C.R. I-153, ¶ 11.

⁶⁶ Litwinczuk, *supra* note 30, at 75 citing Case C-175/88, *Biehl v. Administration des Contributions*, 1990 E.C.R. I-1779, ¶ 14.

⁶⁷ When making reference to nationality, I mean an individual’s citizenship. Typically, the references made in this analysis refer to citizens of Member States. However, in some instances, like that of third-country nationals, it refers to an individual’s citizenship of a non-member State.

⁶⁸ Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, 1995 E.C.R. I-4291, ¶ 96; *see also* Case C-10/90 *Masigo v Bundesknappschaft*, 1991 E.C.R. I-1119, ¶¶ 18-19.

⁶⁹ Litwinczuk, *supra* note 30, at 75 citing Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, 1995 E.C.R. I-4291, ¶ 96 (arguing that a sporting association is prohibited from mandating that a club of another Member State must pay the former club a transfer fee in order for a footballer to change employment).

Similar to *Bosman*, the Court in *Graf* determined whether a company’s refusal to pay an employee compensation on termination of employment constituted a provision which precluded or deterred a national from leaving his Member State in violation of his right to freedom of movement.⁷⁰ Mr. Graf terminated his employment with a company located in Austria in order to reside and work in Germany.⁷¹ The company refused to give Mr. Graf his two months’ salary because under their employment agreement if an employee left “prematurely for no important reason” he was not entitled to the compensation.⁷² Unlike in *Bosman*, however, the Court determined that this provision was not in violation of Art 45 (former EECT Art 48) since Mr. Graf would have been entitled to the compensation had he waited until the contract ended.⁷³ This conclusion, though, seems contrary to that of *Bosman*. Allowing the company to decide when a contract should end is the same as allowing a company to decide that for an employee to leave, the new employer must pay a fee. Such provisions deter employees from leaving and thus restrict their freedom of movement.

There have been inconsistent cases where a national of a Member State invoked the fundamental freedoms against its own state, but the Court spoke about discrimination on a basis of nationality.⁷⁴ The Advocate General Leger, in the Opinion of the *Asscher* case, gives an explanation of this inconsistency:

the nationals of a Member State may rely on Article 48 or 52 of the Treaty concerning freedom of movement when, by virtue of their conduct, they have placed themselves in one of the positions envisaged by Community law and are

⁷⁰ Case C-190/98, *Volker Graf v Filzmoser Maschinenbau GmbH*, 2000 E.C.R. I-493 (holding that a provision that denies entitlement to compensation on termination of employment to an employee who terminates his contract on his own in order to take up employment in another company is valid).

⁷¹ *Id.* ¶ 5.

⁷² *Id.* ¶¶ 3 and 6.

⁷³ *Id.* ¶ 26.

⁷⁴ Litwinczuk, *supra* note 30, at 76 citing Case C-175/88, *Biehl v. Administration des Contributions*, 1990 E.C.R. I-1779; Case C-107/94, *Asscher v. Staatsecretaris van Financien*, 1996 E.C.R. I-3089, ¶¶ 49-50.

with regard to their state of origin, in a situation which may be assimilated to that of any person enjoying the rights and liberties guaranteed by the Treaty.⁷⁵

On the Other hand, Article 45 of the TFEU prohibits both discriminatory treatment on the basis “of nationality in an inbound situation” as well as restrictions created by the home state, unless the restrictions are justified and proportionate.⁷⁶ The Court has articulated that Article 28 of the European Economic Area Agreement (EEA) performs similar functions.⁷⁷ Other international agreements suggest protection from inbound discriminatory situations, but it is yet to be decided whether they apply equally to the protection of outbound situations.⁷⁸

The TFEU “is not concerned with any disparities in treatment, for persons and undertakings subject to the jurisdiction of the Community, which may result from divergences existing between various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality.”⁷⁹ The Court further makes clear that in regards to tax legislation, the Treaty offers no guarantee that an individual, a citizen of the Union, who transfers his or her activities to another Member State will be “neutral as regards taxation” but that such a move may be to the individuals’ tax advantage or disadvantage depending on the legislation and the circumstances.⁸⁰ This is largely so because of the tax disparities between Member States.

⁷⁵ Litwinczuk, *supra* note 30, at 76 citing Opinion of Advocate General Léger, P. H. Asscher v Staatssecretaris van Financiën, Case C-107/94, [1996] E.C.R. I-3089, ¶ 36.

⁷⁶ Litwinczuk, *supra* note 30, at 76.

⁷⁷ Litwinczuk, *supra* note 30, at 76 citing Case C-104/06, Commission of the European Communities v Kingdom of Sweden, 2007 E.C.R. I-671 (“[Provisions] which make entitlement to deferral of taxation on capital gains arising from the sale of a private residential property... also being in national territory [are precluded]”).

⁷⁸ Litwinczuk, *supra* note 30, at 76 citing Lukasz Adamczyk, *The Agreement on the Free Movement of Persons and its Potential Impact on Direct Taxes Systems of EU Member States*, 35 INTERTAX 183, 200 (2007).

⁷⁹ Litwinczuk, *supra* note 30, at 76 citing Case C-403/03, Schempp v. Finanzamt Munchen V, 2005 E.C.R. I-6421, ¶ 34; Case C-354/95, Milk Marque and National Farmers’ Union, 1997 E.C.R. I-4559, ¶ 124.

⁸⁰ Litwinczuk, *supra* note 30, at 76 citing Case C-403/03, Schempp v. Finanzamt Munchen V, 2005 E.C.R. I-6421, ¶ 45 (holding that a provision in which a taxpayer is restricted from deducting his taxable income in that Member State for maintenance paid to his former spouse in another Member State is valid).

The Court has not explicitly defined the term disparity, although it has been used numerous times in explanations.⁸¹ However, according to *Wattel*, to determine whether disparity exists “one should imagine that both states involved were to have exactly the same legal system; if within such thought experiment the disadvantage disappears, then it was a disparity effect.”⁸²

V. THE EUROPEAN TAX REVOLUTION

The harmonization of taxes is not mentioned in the TFEU.⁸³ However, the Court of Justice has established that although “direct taxation does not as such fall within the competence of the Community, powers retained by the Member States in that domain must nonetheless be exercised consistently with Community Law.”⁸⁴ Thus, the Court has reviewed numerous cases on the matter, which has led to what is known as “the European Tax Revolution” or a “negative integration.”⁸⁵ This process has removed national tax law provisions, which the Court found to be incompatible with European Union law.⁸⁶

Not only did the Court rule on national tax legislations, it also considered the treaties between Member States. Under the Court’s case law, “in the absence of unifying or harmonizing measures adopted in the Community the Member States remain competent to determine the criteria for taxation of income and capital with view to eliminating double taxation by means of

⁸¹ Litwinczuk, *supra* note 30, at 76.

⁸² *Id.* citing B J M TERRA & P J WATTEL, EUROPEAN TAX LAW 57 (2005).

⁸³ Litwinczuk, *supra* note 30, at 76.

⁸⁴ Litwinczuk, *supra* note 30, at 76 citing Case C-279/93, Finanzamt Köln-Altstadt v Roland Schumacker, 1995 E.C.R. I-225, ¶ 21.

⁸⁵ Litwinczuk, *supra* note 30, at 76.

⁸⁶ *Id.*

international agreements.”⁸⁷ The Court has made it clear that although Member States retain the power of taxation, they must comply with the Community rules.⁸⁸

The Court has decided that Member States are not required to grant a national of another Member State “the most favored treatment given to” another “on the basis of a tax treaty” following the fundamental freedoms.⁸⁹ The decision in *D.* stated that a non-resident from a Member State is not in a comparable position to that of a non-resident of another Member State that has a bilateral tax treaty with a Member State.⁹⁰ To be precise, the decision states, “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.”⁹¹ Thus, the different treatment of the non-residents from dissimilar Member States not party to the bilateral treaty, the Court held, does not constitute discrimination based on nationality.⁹²

There is, however, an outright criticism of the CJEU’s holding in the *D.* case.⁹³ Overall, van Thiel argues that there is “very little fundamental difference between doing business in another Member state through permanent establishment or through the acquisition of real estate.”⁹⁴ However, it seems as though the Court was hesitant to grant the same ruling in both cases because

⁸⁷ *Id.* at 77. See Case C-336/96, Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin, 1998 E.C.R. I-2793, ¶¶ 24 and 30; See also Case C-307/97, Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161, ¶ 57.

⁸⁸ Litwinczuk, *supra* note 30, at 77 citing Case C-307/97, Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161, ¶ 58.

⁸⁹ Litwinczuk, *supra* note 30, at 77.

⁹⁰ Litwinczuk, *supra* note 30, at 77 citing Case C-376/03, *D. v Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen*, 2005 E.C.R. I-5821, ¶ 61 (arguing that provisions under a bilateral convention for avoidance of double taxation allow residents of the two States personal allowances, but not to others not a party to the convention).

⁹¹ Litwinczuk, *supra* note 30, at 77 citing Case C-376/03, *D. v Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen*, 2005 E.C.R. I-5821, ¶ 61.

⁹² Case C-376/03, *D. v Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen*, 2005 E.C.R. I-5821, ¶ 63.

⁹³ See 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?*, 33 INTERTAX 454, 454 (2005).

⁹⁴ *Id.* at 456.

“a most-favored-nation treatment obligation would constitute a danger for the application of tax treaties.”⁹⁵ Nevertheless, the Court already decided in *Gilly*, that a provision allocating tax jurisdiction between Member States is not discriminatory.⁹⁶ Yet, the Court determined that existing law in essence does not prescribe the most-favored nation treatment by *D.*’s reasoning.⁹⁷ Therefore, it is apparent that the current holding in *D.* undermines the very basic principles of established Community law.⁹⁸ Furthermore, this takes the Court’s decision farther from a bright line rule and even farther from harmonizing its tax decisions.

VI. TAX TREATMENT OF MIGRANT WORKERS

Luxembourg dealt with the first case involving the tax treatment of workers; this case being *Biehl*.⁹⁹ The issue revolved around Luxembourg’s tax provisions at that time.¹⁰⁰ Specifically, the Member State had an overpaid wage tax, which was duly withheld at source from resident taxpayers and could not be repaid if transfer of residence occurred in the course of the year.¹⁰¹ Thus, Mr. Biehl, a Luxembourg resident who moved to Germany, had his refund claim dismissed.¹⁰²

The Court of Justice began the discussion by recalling that “the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same

⁹⁵ *Id.*

⁹⁶ *Id.* See Case C-336/96, Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin, 1998 E.C.R. I-2793.

⁹⁷ 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?*, 33 INTERTAX 454, 456 (2005).

⁹⁸ *Id.* at 457.

⁹⁹ Case C-175/88, *Biehl v. Administration des Contributions*, 1990 E.C.R. I-1779 (holding that provisions that deduct sums from salaries of employed individuals of a Member State whom are resident taxpayers for only a part of the year, remain property of the Member State are invalid).

¹⁰⁰ *Id.* ¶ 5.

¹⁰¹ *Id.* ¶ 6.

¹⁰² *Id.* ¶¶ 3 and 5.

result.”¹⁰³ Applying these criteria, the Court determined that “even though the criterion of permanent residence in the national territory [...] applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States.”¹⁰⁴ Therefore, the Luxembourg provisions were found to be discriminatory and incompatible with the EU law.¹⁰⁵

The lesson that should be taken from this case is the idea that the Court came to a conclusion by evaluating and applying the prohibition of covert discrimination in the field of direct taxation without any justifications for its qualifications.¹⁰⁶ The conclusion implied that there is no objective difference between residents and non-residents that would imply a justification of unfavorable treatment of the non-residents.¹⁰⁷ Thus, any Member State’s tax provisions disfavoring non-residents is likely to get struck down by the Court.¹⁰⁸

VII. THE SCHUMACKER PRINCIPLE

The *Schumacker* principle came about because of the 1967 Belgium-Germany tax treaty.¹⁰⁹ Mr. Schumacker was a Belgian national residing in Belgium and working in Germany.¹¹⁰ However, according to the treaty, his income was taxable in the state where he was employed but in Belgium he would receive an exemption with progression.¹¹¹ Thus, because of the treaty, Mr. Schumacker was unable to take advantage of personal allowances in Belgium since all of his

¹⁰³ Litwinczuk, *supra* note 30, at 77 citing Case C-175/88, *Biehl v. Administration des Contributions*, 1990 E.C.R. I-1779, ¶ 13. *See also* Case C-152/73, *Sotgiu v Deutsche Bundespost*, 1974 E.C.R. I-153, ¶ 11.

¹⁰⁴ Case C-175/88, *Biehl v. Administration des Contributions*, 1990 E.C.R. I-1779, ¶ 14.

¹⁰⁵ *Id.* ¶ 19.

¹⁰⁶ Litwinczuk, *supra* note 30, at 77.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Case C-279/93, *Finanzamt Koln-Alstadt v. R. Schumacker*, 1995 E.C.R. I-225, ¶ 16.

¹¹⁰ *Id.* ¶ 15.

¹¹¹ *Id.* ¶ 16.

earned income came from Germany.¹¹² Conversely, he was denied benefits in Germany because he was treated as a non-resident.¹¹³

The Court’s interpretation of the issue began with identifying that national laws denying tax benefits to nationals of other member States as non-residents are typically foreigners, and thus constitute indirect discrimination.¹¹⁴ However, the Court further distinguishes between residents and non-residents thus holding residents “are not, as a rule” in comparable situations, and therefore application of different rules does not necessarily mean discrimination.¹¹⁵

The Court provided two reasons for this distinction. First, it was stated that typically a non-resident earns his or her income only partially in the source state and the rest is earned in the residence state.¹¹⁶ Second, “ a taxpayer’s personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to access in the residence state as his personal and financial interests are centered there and, consequently, the necessary information is available there.”¹¹⁷ Because of these determinations, the Court held that “the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation” and therefore the EC Treaty is not violated.¹¹⁸

Nonetheless, the Court did qualify the general idea of non-comparability of a non-resident to a resident by introducing a situation “where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity

¹¹² *Id.* ¶ 15.

¹¹³ *Id.* ¶ 18.

¹¹⁴ Litwinczuk, *supra* note 30, at 78 citing Case C-279/93, Finanzamt Koln-Alstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶ 28.

¹¹⁵ Case C-279/93, Finanzamt Koln-Alstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶ 31.

¹¹⁶ *Id.* ¶ 32.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 34.

performed in the State of employment,” thus making it impossible for his State of residence to take account of his personal and family circumstances.¹¹⁹ Objectively, there was no difference between a resident and non-resident under this situation.¹²⁰ Therefore, the Court determined Mr. Schumacker was discriminated against because neither his residence state nor the state of employment took into account his personal and family circumstances.¹²¹

Thus, *Schumacker* created the concept of a “virtual tax resident.”¹²² This means where a non-resident is earning all or almost all of his or her income from a source state and whose residence state cannot take into account his or her personal and family circumstances into account.¹²³ These conditions are today known as the *Schumacker* test.¹²⁴ As a result, when a non-resident meets the requirements of this test, the employment state is under obligation to grant the individual a national tax treatment.¹²⁵

According to the Advocate General Léger, “the taxpayer’s personal situation is therefore taken into account only in his state of residence, were the taxation takes into account all of his income in order to avoid duplication of the personal relief and deductions granted to him.”¹²⁶ Consequently, this principle comes into play “when a negative conflict of jurisdiction exists between the state of employment and the state of residence where neither of those states on the basis of the relevant tax treaty takes personal circumstances into account.”¹²⁷ In conjunction, it

¹¹⁹ Litwinczuk, *supra* note 30, at 78 citing Case C-279/93, Finanzamt Köln-Alstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶ 36.

¹²⁰ Case C-279/93, Finanzamt Köln-Alstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶ 37.

¹²¹ Litwinczuk, *supra* note 30, at 78 citing Case C-279/93, Finanzamt Köln-Alstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶ 38.

¹²² Litwinczuk, *supra* note 30, at 78.

¹²³ *Id.* at 78-79 citing Case C-279/93, Finanzamt Köln-Alstadt v. R. Schumacker, 1995 E.C.R. I-225, ¶¶ 36-37.

¹²⁴ Litwinczuk, *supra* note 30, at 79.

¹²⁵ *Id.*

¹²⁶ Litwinczuk, *supra* note 30, at 79 citing Opinion of Advocate General Léger, Finanzamt Köln-Alstadt v. R. Schumacker, Case C-279/93, [1995] E.C.R. I-228, ¶ 60.

¹²⁷ Litwinczuk, *supra* note 30, at 79 citing Opinion of Advocate General Léger, Finanzamt Köln-Alstadt v. R. Schumacker, Case C-279/93, [1995] E.C.R. I-228, ¶ 67.

becomes evident that the *Shumacker* principle is an anti-abuse provision in effect preventing individuals to claim personal allowances twice.¹²⁸

Schumacker is a modern case on the basis that the Court of Justice balanced accommodating and integrating EU law as well as direct and tax treaty considerations.¹²⁹ Despite the lack of harmonization measures, this case opened the possibility to confront future direct tax matters.¹³⁰ The history of its application shows how the Court of Justice has moved from determining certain Member State provisions are precluded as discriminatory to individual taxpayers to determining that such provisions under similar circumstances are not precluded. Thus, moving further away from harmonizing tax measures between Member States.

VIII. SPOUSAL DISCRIMINATION

Another important topic relevant to discrimination of workers involves a spouse. In *Zurstrassen*, a Belgian national both worked and lived in Luxembourg.¹³¹ His wife, to whom he was not separated from, lived in Belgium and took care of the children; she had no other job that earned income.¹³² According to Luxembourg law, joint assessment for tax purposes was limited to couples where both spouses were resident in Luxembourg.¹³³ Thus, Mr. Zurstrassen was denied a split tariff because his wife was not a resident of Luxembourg.¹³⁴

The Court of Justice determined that the law did not ensure equal treatment.¹³⁵ The Court noted that it is easier for both spouses who are nationals of Luxembourg to fulfill the requirement

¹²⁸ Litwinczuk, *supra* note 30, at 79.

¹²⁹ F. Alfredo Garcia Prats, *Revisiting “Schumacker”: Source, Residence and Citizenship in the ECJ Case Law on Direct Taxation*, in *ALLOCATING TAXING POWERS WITHIN THE EUROPEAN UNION* 1, 3 (I. Richelle et al. eds., 2013).

¹³⁰ *Id.* at 2.

¹³¹ Case C-87/99, Patrick Zurstrassen v Administration des contributions directes, 2000 E.C.R. I-3337, ¶ 8 (arguing that a joint tax assessment of spouses cannot be conditional on them both being resident in the Member State).

¹³² *Id.* ¶¶ 8-9.

¹³³ *Id.* ¶ 7.

¹³⁴ *Id.* ¶ 10.

¹³⁵ *Id.* ¶ 20.

than it is for nationals of other Member States who have moved to Luxembourg “in order to pursue an economic activity”, whose members of family more frequently reside outside of Luxembourg.¹³⁶

Next, in *Gschwind*, a national of the Netherlands lived together with his wife in the Netherlands, but earned all of his income in Germany.¹³⁷ The sole difference between this case and *Zurstrassen* was that here the wife worked in the Netherlands.¹³⁸ Following the 1959 Netherlands-Germany tax treaty and national law, Mr. Gschwind’s income was solely taxable in Germany.¹³⁹ Germany allowed him to deduct certain business and training expenses and granted him a dependent child allowance.¹⁴⁰ His wife received remuneration and was given allowances in the Netherlands.¹⁴¹ The husband applied for a joint assessment in Germany but was denied.¹⁴² Under German provisions at that time, “a non-resident could benefit from splitting tariff when either his income represented 90% of the aggregate income of his household or if the household income not taxable in Germany was not higher than DEM 24 000.”¹⁴³ Mr. Gschwind met neither of those requirements.¹⁴⁴

German tax authorities argued that such treatment did not violate EU law on the basis of the *Schumacker* test.¹⁴⁵ Applying that principle, “non-residents may benefit from the splitting procedure only if their personal and family circumstances could not be taken into account in the

¹³⁶ *Id.* ¶ 19.

¹³⁷ Case C-391/97, *Frans Gschwind v Finanzamt Aachen-Außenstadt*, 1999 E.C.R. I-5451, ¶ 9 (arguing that a provision which grants resident married couples favorable tax treatment, and non-resident married couples a less favorable tax treatment is valid).

¹³⁸ *Id.* ¶ 10.

¹³⁹ *Id.*

¹⁴⁰ *Id.* ¶ 7.

¹⁴¹ *Id.* ¶ 11.

¹⁴² Case C-391/97, *Frans Gschwind v Finanzamt Aachen-Außenstadt*, 1999 E.C.R. I-5451, ¶ 11.

¹⁴³ *Id.* ¶ 6.

¹⁴⁴ *Id.* ¶ 11.

¹⁴⁵ Litwinczuk, *supra* note 30, at 81 citing Case C-391/97, *Frans Gschwind v Finanzamt Aachen-Außenstadt*, 1999 E.C.R. I-5451, ¶¶ 15-16.

state of residence” and here the couple had enough income to have their tax assessed in Belgium.¹⁴⁶ Conversely, the Belgian government declared, “there is no objective reason to justify refusing to apply the splitting procedure to a non-resident couple on the ground that the couple's income from foreign sources exceeds a specific ceiling or a given percentage of the couple's total income.”¹⁴⁷

Surprisingly, the Commission was in favor of the taxpayer by indicating that the spouse with the higher income “can benefit from the splitting tariff by falling in a lower tax bracket under progression rules.”¹⁴⁸ Additionally, the Commission pointed out that the current situation was objectively comparable “to that of a couple residing in Germany one of whom receives, in another Member State, earned income exempt from German tax under a double-taxation treaty but to whom the German legislature allows the splitting arrangement to be applied.”¹⁴⁹

In the end, the Court distinguished the case here from that of *Schumacker* by explaining:

in the present case, given that nearly 42% of the total income of the Gschwinds is received in their State of residence, that State was in a position to take into account Mr. Gschwind’s personal and family circumstances according to the rules laid down by the legislation of that State, since the tax base is sufficient there to enable them to be taken into account.¹⁵⁰

Thus, the Court of Justice found no discrimination in violation of the Treaty.¹⁵¹ However, although the Court determines Mr. Gschwind’s circumstances were taken into account in Belgium, they were in fact not.¹⁵² This leads to conclude that it was impossible for him to double dip, which was

¹⁴⁶ *Id.* ¶ 15.

¹⁴⁷ Litwinczuk, *supra* note 30, at 81 citing Case C-391/97, Frans Gschwind v Finanzamt Aachen-Außenstadt, 1999 E.C.R. I-5451, ¶ 17.

¹⁴⁸ Case C-391/97, Frans Gschwind v Finanzamt Aachen-Außenstadt, 1999 E.C.R. I-5451, ¶ 18. *See* Litwinczuk, *supra* note 30, at 81.

¹⁴⁹ Case C-391/97, Frans Gschwind v Finanzamt Aachen-Außenstadt, 1999 E.C.R. I-5451, ¶ 18.

¹⁵⁰ Litwinczuk, *supra* note 30, at 82 citing Case C-391/97, Frans Gschwind v Finanzamt Aachen-Außenstadt, 1999 E.C.R. I-5451, ¶ 29.

¹⁵¹ Case C-391/97, Frans Gschwind v Finanzamt Aachen-Außenstadt, 1999 E.C.R. I-5451, ¶ 32.

¹⁵² Litwinczuk, *supra* note 30, at 82 citing P J Wattel, *European Union: Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice*, 40 EUROPEAN TAXATION 210, 218 (2000).

the essence behind the *Schumacker* principle.¹⁵³ Moreover, just like the Commission pointed out, “it would make no sense” for the “spouse with the lower income” to apply for the joint assessment.¹⁵⁴

Notwithstanding, the Court had the opportunity to rectify its decision in *Meindl*.¹⁵⁵ The facts of this case regarded an Austrian national residing in Germany who received all of his income from Germany.¹⁵⁶ The wife was a resident of Austria but did not receive any employment income.¹⁵⁷ However, she did receive a confinement allowance, a maternity allowance and a family allowance in the form of payments amounting DEM 27 000 from the government of Austria.¹⁵⁸ Under Austrian law, the wife’s income was not taxable, but under German law it was.¹⁵⁹

German law stipulated that “joint assessment is possible only where at least 90% of the income of both spouses for the calendar year is subject to German income tax or where the amount of income not subject to that tax does not exceed DEM 24 000.”¹⁶⁰ Because the couple did not qualify under these provisions, German authorities denied the application for a joint assessment.¹⁶¹

The Court’s analysis began with pointing out that a German resident with a spouse who received non-taxable income, who was also a resident of Germany, would benefit from a joint assessment.¹⁶² Therefore, the claimant here was subjected to different treatment.¹⁶³ Additionally, the Court held that the present case was comparable to “a resident taxpayer whose spouse is a

¹⁵³ Litwinczuk, *supra* note 30, at 82.

¹⁵⁴ *Id.*

¹⁵⁵ Litwinczuk, *supra* note 30, at 82. *See* Case C-329/05, Finanzamt Dinslaken v Gerold Meindl, 2006 E.C.R. I-1107 (holding that refusing a resident taxpayer joint assessment of income with his spouse who lives in another Member State is not valid).

¹⁵⁶ Case C-329/05, Finanzamt Dinslaken v Gerold Meindl, 2006 E.C.R. I-1107, ¶ 9.

¹⁵⁷ *Id.* ¶¶ 9-10.

¹⁵⁸ *Id.* ¶¶ 10 and 12.

¹⁵⁹ *Id.* ¶ 12.

¹⁶⁰ *Id.* ¶ 6.

¹⁶¹ Case C-329/05, Finanzamt Dinslaken v Gerold Meindl, 2006 E.C.R. I-1107, ¶ 12.

¹⁶² *Id.* ¶ 25.

¹⁶³ *Id.*

resident in another Member State and receives there only income not subject to tax because, in both cases, the household's taxable income is derived from professional activity of only one of the spouses and, in both cases, that spouse is the resident taxpayer."¹⁶⁴ "The state of residence of" that kind of a "taxpayer is the only State" that can take into account "the taxpayer's personal and family circumstances."¹⁶⁵ Therefore, the denial of the joint assessment in this case was ruled to be discrimination prohibited by the Treaty.¹⁶⁶

The decision by the Court in *Meindl* is clearly different than that of *Gschwind*.¹⁶⁷ In the former case, the denial of the splitting tariff was found to be discriminatory and in violation of the Treaty, unlike the holding in the latter case.¹⁶⁸ There seemed to be no substantial differences between the two cases.¹⁶⁹ It is irrelevant to the analysis the fact that Mr. Meindl was a resident of the state of employment since in both cases the husbands did not receive any other income or allowances from any other state.¹⁷⁰ Therefore, it is inferred that the Court overruled the holding in *Gschwind* with *Meindl*.¹⁷¹

Following this is the *Schempp* case. Here, a German resident was paying maintenance fees to his former spouse, a resident of Austria.¹⁷² German authorities denied a deduction for the payments arguing that the taxpayer did not produce a certificate from Austrian authorities

¹⁶⁴ Litwinczuk, *supra* note 30, at 82 citing Case C-329/05, Finanzamt Dinslaken v Gerold Meindl, 2006 E.C.R. I-1107, ¶ 26.

¹⁶⁵ Litwinczuk, *supra* note 30, at 83 citing Case C-329/05, Finanzamt Dinslaken v Gerold Meindl, 2006 E.C.R. I-1107, ¶ 29.

¹⁶⁶ Case C-329/05, Finanzamt Dinslaken v Gerold Meindl, 2006 E.C.R. I-1107, ¶ 32.

¹⁶⁷ Litwinczuk, *supra* note 30, at 83.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Case C-403/03, *Schempp v Finanzamt München V*, 2005 E.C.R. I-6421, ¶ 7.

confirming that his former spouse was taxed on those payments.¹⁷³ However, under Austrian law, such payments were not taxable.¹⁷⁴

The Court held that “the payment of maintenance to a recipient resident in Germany cannot be compared to the payment of maintenance to a recipient resident in Austria as the recipient is subject in each of those two cases, as regards taxation of the maintenance payments, to a different tax system.”¹⁷⁵ The Court therefore found Mr. Schempp was not victimized by a discriminatory threat prohibited by the Treaty, but rather of a disparity between two tax systems, which is outside the scope of the fundamental freedoms.¹⁷⁶ This case was distinctly more so a tax disparity because the evidence provided made clear that one Member State taxed such maintenance fees while the other chose not to do so.

In 2011, the CJEU came to its *Schulz* decision.¹⁷⁷ Mr. Schulz was a German national working in Germany as an attorney.¹⁷⁸ His spouse, Ms. Schulz-Delzers, was a French national working in Germany as a teacher.¹⁷⁹ Ms. Schulz-Delzers was privy to two allowances, which were exempt in France.¹⁸⁰ However, the German authorities took into account the two allowances in the progressive application of tax, thus raising the spouses’ income tax by EUR 654.¹⁸¹ Accordingly, the Court, applying the *Schumacker* principle as well as its prior holding in *Schempp*, determined that “the Treaty offers no guarantee to a citizen of the Union that transferring his

¹⁷³ *Id.* ¶ 8.

¹⁷⁴ *Id.* ¶ 9.

¹⁷⁵ Litwinczuk, *supra* note 30, at 83 citing Case C-403/03, *Schempp v Finanzamt München V*, 2005 E.C.R. I-6421, ¶ 35.

¹⁷⁶ Litwinczuk, *supra* note 30, at 83 citing Case C-403/03, *Schempp v Finanzamt München V*, 2005 E.C.R. I-6421, ¶ 36.

¹⁷⁷ Case C-240/10, *Cathy Schulz-Delzers and Pascal Schulz v Finanzamt Stuttgart III*, 2011 E.C.R. I-8531 (arguing that a provision granting allowances to civil servants of a Member State working in another Member State to compensate for loss of purchasing power, but does not take into account the tax rate applicable in the first Member State to other income of the taxpayer or his spouse is valid).

¹⁷⁸ *Id.* ¶ 18.

¹⁷⁹ *Id.* ¶ 19.

¹⁸⁰ *Id.* ¶ 21.

¹⁸¹ *Id.* ¶ 22.

activities to a Member State other than that in which he previously resided will be neutral as regards taxation.”¹⁸² Thus, the provision was not discriminatory.¹⁸³

In *Schulz*, the Court determines there is no discriminatory action taken against the couple by the German government because tax disparities between Member States are allowed.¹⁸⁴ Therefore, although tax legislation may be beneficial in France, that is not the case in Germany.¹⁸⁵ However, it was the couple’s discretion to move to Germany and to be jointly assessed there, and because of allowable tax disparities “such a transfer may be to the citizen’s advantage or not.”¹⁸⁶ Over time, the Court of Justice has applied a stricter interpretation of the *Schumaker* principle and thus makes it harder for migrant workers to prove discriminatory provisions made by Member States. Conversely, the Court makes it easier for Member States to invoke such provisions.

IX. TAXATION OF ALLOWANCES

The next issue of topic is taxation of allowances. In the case of *Wallentin*, a German student worked as an intern for the Swedish Church over the summer months and earned SEK 8724 as remuneration.¹⁸⁷ German authorities at the time considered such an income as non-taxable.¹⁸⁸ In Sweden, the law considered the full basic allowance of SEK 8600 allowable only to residents that were taxed progressively.¹⁸⁹ However, a person residing in Sweden for less than six months, also regarded as a non-resident, would receive only a proportionate part of the basic allowance and would be taxed at a flat rate of 25%.¹⁹⁰ Thus, Swedish authorities denied Mr.

¹⁸² Case C-240/10, *Cathy Schulz-Delzers and Pascal Schulz v Finanzamt Stuttgart III*, 2011 E.C.R. I-8531, ¶ 42.

¹⁸³ *Id.* ¶ 43.

¹⁸⁴ *Id.* ¶ 42.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Case C-169/03, *Florian W. Wallentin v Riksskatteverket*, 2004 E.C.R. I-6443, ¶¶ 3-4 (holding that a provision denying allowance calculation of tax to nonresidents of a Member State who receive income from that state is invalid).

¹⁸⁸ *Id.* ¶ 3.

¹⁸⁹ *Id.* ¶ 7.

¹⁹⁰ *Id.* ¶ 5.

Wallentin the full basic allowance because he was a resident of Germany and spent less than six months in Sweden.¹⁹¹

The Court determined that Mr. Wallentin passed the *Schumacker* test.¹⁹² Under the analysis of the test, he did not receive any taxable income in Germany, his residence state, and therefore Germany was not able to take into account his personal and family circumstances.¹⁹³ Thus, the Court found the denial of the basic allowance constituted discrimination prohibited by the Treaty.¹⁹⁴

The Court distinguished *Wallentin* in the case of *D. D.* *D.* involved a German national who owned 10% of his property in the Netherlands.¹⁹⁵ Under the law in the Netherlands, a resident was entitled to a basic allowance and a non-resident could only enjoy the same right if 90% or more of the property was located in the Netherlands.¹⁹⁶

The taxpayer argued that because Germany did not impose a wealth tax, his sole taxable base was in the Netherlands, and applying the findings of *Wallentin*, the source state was required to grant him a basic allowance.¹⁹⁷ Even the Advocate General Ruiz-Jarobo Colomer supported these contentions.¹⁹⁸ However, the Court held that because the taxpayer “holds the major part of his wealth in the State where he is resident, the Member State in which he holds only a proportion of his wealth is not required to grant him the benefits which it grants to its own residents.”¹⁹⁹

¹⁹¹ *Id.*

¹⁹² Litwinczuk, *supra* note 30, at 84 citing Case C-169/03, Florian W. Wallentin v Riksskatteverket, 2004 E.C.R. I-6443, ¶¶ 17 -18.

¹⁹³ Case C-169/03, Florian W. Wallentin v Riksskatteverket, 2004 E.C.R. I-6443, ¶¶ 17 -18.

¹⁹⁴ *Id.* ¶ 24.

¹⁹⁵ Case C-376/03, D. v. Inspecteur van de Belastingdienst, 2005 E.C.R. I-5821, ¶ 15.

¹⁹⁶ *Id.* ¶¶ 7 and 9.

¹⁹⁷ *Id.* ¶ 16.

¹⁹⁸ Litwinczuk, *supra* note 30, at 84 citing Opinion of Advocate General Colomer, D. v. Inspecteur van de Belastingdienst, Case C-376/03, [2005] E.C.R. I-5821, ¶¶ 63-65.

¹⁹⁹ Litwinczuk, *supra* note 30, at 84 citing Case C-376/03, D. v. Inspecteur van de Belastingdienst, 2005 E.C.R. I-5821 ¶ 41.

The Court tried to distinguish *Wallentin* from the case at hand by showing that the former “received only payments that did not of their nature constitute taxable income under German legislation.”²⁰⁰ Thus, the Court distinguishes heavily between discrimination based on nationality and fair disparities amongst tax legislations of different Member States.

X. CONCLUSION

Therefore, it is appropriate to consider first, whether an individual qualifies as a worker under the case law interpretation of the word. This is fairly easy and typically most individuals will fall under this category. Next, the context of the issue must fall within the scope of the fundamental freedoms, meaning that the issue must not be a solely internal one within a single Member State. This is yet another rather easy factor to determine. However, it is much more difficult to determine whether the issue involves actual discriminatory treatment by a Member State or not.

It must be first determined whether there is an existing treaty amongst Member States that is at play. If there is, the Court is likely to hold that nationals of different Member States do not have the same standing and therefore there is no discrimination in violation of European Union law. Nevertheless, if there is no treaty relevant to the issue, then the *Schumacker* principle comes in, at least in cases of tax legislation and alleged discrimination based on nationality. If an individual can prove that neither the residence state nor the employment state take into account the individuals personal and family circumstances, it is very likely that the Court will find discrimination. Nonetheless, the Court of Justice has not always been consistent with its holdings, and thus although there seems to be some foundation to determining discriminatory treatment of

²⁰⁰ Litwinczuk, *supra* note 30, at 84 citing Case C-376/03, *D. v. Inspecteur van de Belastingdienst*, 2005 E.C.R. I-5821 ¶ 42.

migrant workers in regards to tax legislations, there is no bright line rule to all situations since they are all very fact sensitive.

Moreover, it seems as though the Court in recent decisions has been more in favor of Member States. This means that the CJEU is less likely to find a tax provision to be discriminatory against a migrant worker than it first was when it came out with the *Schumacker* principle. Such considerations by the Court seem to be contrary both to past EU case law and Art 45 of the TFEU. Thus, instead of harmonizing tax measures it looks as though the opposite takes place.