Provisional text

JUDGMENT OF THE COURT (Second Chamber)

2 March 2017 (*)

(Reference for a preliminary ruling — Freedom of movement for workers — Article 45 TFEU — Regulation (EU) No 492/2011 — Article 7 — Equal treatment — Frontier worker subject to income tax in the Member State of residence — Benefit paid by the Member State of employment in the event of the employer's insolvency — Detailed rules for the calculation of the insolvency benefit — Notional taking into account of the income tax of the Member State of employment — Insolvency benefit lower than the previous net remuneration — Bilateral convention for the avoidance of double taxation)

In Case C?496/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landessozialgericht Rheinland-Pfalz, Mainz (Rhineland-Palatinate Higher Social Court, Mainz, Germany), made by decision of 23 July 2015, received at the Court on 22 September 2015, in the proceedings

Alphonse Eschenbrenner

v

Bundesagentur für Arbeit,

THE COURT (Second Chamber),

composed of M. Ileši?, President of the Chamber, A. Prechal, A. Rosas (Rapporteur), C. Toader and E. Jaraši?nas, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 July 2016,

after considering the observations submitted on behalf of:

– the Bundesagentur für Arbeit, by B. Klug, acting as Agent,

– the German Government, by T. Henze and A. Lippstreu, acting as Agents,

– the European Commission, by M. Kellerbauer, M. Wasmeier and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2016,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 45 TFEU and

Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

2 The request has been made in proceedings between Mr Alphonse Eschenbrenner, a French citizen residing in France and working in Germany, and the Bundesagentur für Arbeit (Federal Employment Agency, Germany) ('the Agency') in relation to the notional taking into account of German income tax when determining the amount of insolvency benefit awarded to him.

Legal context

International law

3 Under Article 13 of the Convention of 21 July 1959, concluded between the French Republic and the Federal Republic of Germany for the avoidance of double taxation and making provision for rules for mutual legal and administrative assistance in the field of income and wealth tax and in the field of business tax and land tax ('the Tax Convention'), as amended, provides:

'(1) Subject to the provisions of the following paragraphs, income from dependent work shall be taxable only in the Contracting State in which the personal activity in respect of which it is received is carried out. In particular, salaries, wages, pay, gratuities or other emoluments shall be deemed to constitute income from dependent work, together with all similar benefits paid or awarded by persons other than those referred to in Article 14.'

...

(5)(a) By way of exception [to paragraph 1], income from dependent work earned by persons who work in the frontier area of one Contracting State and who have their permanent home in the other Contracting State, to which they normally return each day, shall be taxable only in that other State;

... '

4 Article 14 of that Convention provides:

'(1) Salaries, wages and similar remuneration, and retirement pensions, paid by one of the Contracting States, by a Land or by a legal person of that State or Land governed by public law to natural persons resident in the other State in consideration for present or past administrative or military services shall be taxable only in the first State. ...

(2) The provisions of the first sentence of paragraph 1 shall also apply:

1. to amounts paid as statutory social insurance;

...'

European Union law

Regulation No 492/2011

5 Chapter I of Regulation No 492/2011 is entitled 'Employment, equal treatment and workers' families'. Under section 2, entitled 'Employment and equality of treatment', Article 7 of that regulation provides:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions

of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...'

Directive 2008/94/EC

6 Under Chapter I, entitled 'Scope and definitions', of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36), Article 1(1) provides:

'This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).'

7 Article 2(2), first subparagraph, of that directive states:

'This Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".'

8 Under Chapter II, entitled 'Provisions concerning guarantee institutions', Article 3 is worded as follows:

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.'

9 Under that chapter, Article 4 of Directive 2008/94 provides:

'1. Member States shall have the option to limit the liability of guarantee institutions referred to in Article 3.

2. If Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in the second paragraph of Article 3.

...

3. Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.

...'

German law

10 Paragraph 3(2)(b) of the Law on income tax (Einkommensteuergesetz) exempts insolvency benefits from income tax.

11 The first sentence of Paragraph 165(1), entitled ‘Rights’, in Book III, entitled ‘Promotion of employment’, of the Sozialgesetzbuch (German Social Security Code) (‘SGB III’) provides:

‘1) Workers are entitled to insolvency benefit where they have taken up employment on national territory and where, in the event of the insolvency of their employer, they have claims for outstanding salary for the previous three months of the employment contract.’

12 As provided in Paragraph 167 of the SGB III, entitled ‘Amount’:

‘(1) Insolvency benefit is paid in the amount of net remuneration, which is equal to the gross remuneration, up to the monthly ceiling for calculating contributions laid down in Paragraph 341(4) of the SGB III, minus statutory deductions.

(2) If the employee

...

2. is not subject to income tax on the national territory and the insolvency benefit is not taxable under the rules that apply to him,

the taxes which would have been deducted from the remuneration had the employee been subject to income tax on the national territory shall be deducted from the remuneration.’

13 The first sentence of Paragraph 169 of the SGB III, entitled ‘Subrogation’, is worded as follows:

‘Claims relating to pay which give rise to entitlement to insolvency benefit shall be transferred by subrogation to [the Agency] when insolvency benefit is requested.’

The facts in the main proceedings and the questions referred for a preliminary ruling

14 Mr Eschenbrenner, a French national, lives in Rahling (France), close to the German border. Since 1996, he had been employed as a driver with the undertaking Philipp’s Reisen, located in Pirmasens (Germany). According to a certificate issued by the head of the relevant French Centre des Impôts (Taxation Centre), Mr Eschenbrenner met, by reason of that employment, the necessary conditions to qualify as a frontier worker pursuant to Article 13(5)(a) of the Tax Convention and, consequently, the salary he received in Germany was, in accordance with the provisions of that convention, subject to tax in France.

15 On 29 June 2012, insolvency proceedings were opened against Philipp’s Reisen. While salaries and wages were paid in full by that undertaking up to March 2012, Mr Eschenbrenner had, on the date of the opening of the insolvency proceedings, a claim against his employer of EUR 5 571.88 in respect of his remuneration for the months of April to June 2012.

16 By virtue of those outstanding salary claims, Mr Eschenbrenner requested, on 13 July 2012, the payment of insolvency benefit. To calculate the amount of that benefit, the Agency deducted from Mr Eschenbrenner’s gross remuneration the sum of EUR 3550.24 awarded by the provisional liquidator by way of advance payment for the period 1 April to 28 June 2012, as well as an amount corresponding to social security contributions and an advance, in respect of expenses, he had obtained for the month of April. Moreover, the Agency, pursuant to Paragraph 167(2) of the SGB

III, deducted from that remuneration an amount corresponding to income tax, calculated in accordance with German law, amounting for the three months at issue, to EUR 185, EUR 175 and EUR 173 respectively. Consequently, by decision of 18 July 2012, Mr Eschenbrenner was awarded a total amount of EUR 356.77 in respect of that benefit.

17 In his complaint against that decision, Mr Eschenbrenner claimed, in essence, that the taking into account of the tax at the rate applicable in Germany, in the calculation of the insolvency benefit, was discriminatory and, therefore, contrary to EU law, because he was not subject to tax in Germany. By decision of 18 September 2012, the Agency rejected that complaint.

18 Mr Eschenbrenner brought proceedings against the Agency's decision, claiming that the calculation method for the amount of insolvency benefit was incompatible with EU law, on the ground that it did not allow frontier workers, such as Mr Eschenbrenner, to receive an insolvency benefit equivalent to their previous net remuneration. Unlike persons working and residing in Germany, the amount of the benefit for frontier workers is lower than their previous net remuneration because, inter alia, of the differences between tax rates applicable in Germany and France. After the dismissal of his action by the Sozialgericht Speyer (Social Court, Speyer, Germany), Mr Eschenbrenner brought an appeal before the Landessozialgericht Rheinland-Pfalz, Mainz (Rhineland-Palatinate Higher Social Court, Mainz).

19 That court considers that Mr Eschenbrenner can only succeed with his claim if the requirement of equal treatment with employees taxable in Germany, as provided for in EU law, precludes German income tax, being taken into account, notionally, in accordance with Paragraph 167(2) of the SGB III, at the time of the calculation of the amount of insolvency benefit. While noting that the insolvency benefit amounts to a social advantage within the meaning of Article 7 of Regulation No 492/2011, the referring court observes that, pursuant to that provision, frontier workers may not be treated differently from national workers on the ground of their nationality and must inter alia benefit from the same social and tax advantages as those national workers.

20 In that regard, the Court has already ruled that the notional deduction of German income tax amounted to indirect discrimination, first, in the context of the calculation of the increased interim assistance in favour of ex-civilian employees of the Allied Forces in Germany (judgment of 16 September 2004, *Merida*, C?400/02, EU:C:2004:537) and, second, in the context of the calculation of top-up amounts on wages paid to workers placed on a scheme of part-time work prior to retirement (judgment of 28 June 2012, *Erny*, C?172/11, EU:C:2012:399).

21 The referring court acknowledges that, unlike the circumstances at issue in those two cases, Paragraph 167(2) of the SGB III does not, as such, lead to double taxation in the circumstances at issue in the main proceedings, since the insolvency benefit is, pursuant to Article 14(2)(1) of the Tax Convention, taxable in the State which awards that benefit, it is exempt from taxation in Germany pursuant to Paragraph 3(2)(b) of the Law on income tax and, consequently, only the tax which would have been due in Germany is taken into account, notionally, in the calculation of the insolvency benefit.

22 However, the referring court considers that the amount of the insolvency benefit should, in principle, be equal to the previous net remuneration of the worker. While, under the calculation method provided for in Paragraph 167(2) of the SGB III, frontier workers are put in an identical position to persons residing and working in Germany as regards the amount of insolvency benefit received, that method does not allow specifically for frontier workers to obtain compensation equal to their previous net remuneration.

23 The referring court is asking, furthermore, whether such an outcome is compatible with Directive 2008/94. Referring in particular to the judgments of 4 March 2004, *Barsotti and Others*

(C?19/01, C?50/01 and C?84/01, EU:C:2004:119) and of 17 November 2011, *van Ardennen* (C?435/10, EU:C:2011:751), that court considers that, although that directive allows Member States to set ceilings on the payments made by the guarantee institution, it provides, nevertheless, for full compensation of outstanding salary claims below those ceilings. In the circumstances of this case, it follows from the application of the legal provisions at issue that the outstanding salary claims will not be fully compensated.

24 That court states also that, contrary to what was stated by the court of first instance in its decision, it is not clear that Mr Eschenbrenner has, under German law, the possibility of asserting a claim against his employer for the difference between the amount of the insolvency benefit, calculated in accordance with Paragraph 167(2) of SGB III, and his previous gross salary.

25 In those circumstances, the Landessozialgericht Rheinland-Pfalz (Higher Social Court, Rhineland-Palatinate) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘1) Is it compatible with the rules of primary and/or secondary EU law (in particular Article 45 TFEU ... and Article 7 of Regulation No 492/2011), in the case of an employee who pursues an occupational activity in Germany, who is resident in another Member State and not subject to income tax in Germany, and for whom insolvency benefit, under the provisions applicable to him, is not taxable, that, in the event of his employer’s insolvency, the remuneration from employment tax used to calculate his insolvency benefit is subject to the notional taxation that would be charged as a deduction on his remuneration from employment were he subject to income tax in Germany, if he no longer has the possibility of asserting a claim against his employer for his residual gross remuneration?

2) If Question 1 is answered in the negative, can it be considered compatible with the rules of primary and/or secondary EU law if, in the circumstances described, the employee retains the possibility of asserting a claim against his employer for his residual gross remuneration?’

The questions referred

The first question

26 By its first question, the referring court asks, in essence, whether, in circumstances such as those at issue in the main proceedings, Article 45 TFEU and Article 7 of Regulation No 492/2011 must be interpreted as precluding the amount of the insolvency benefit, awarded by a Member State to a frontier worker — who is not subject to income tax in that State, and for whom that benefit, under the provisions applicable to him, is not taxable — from being determined by deducting income tax, as it applies in that State, from the remuneration used to calculate that benefit, with the result that that frontier worker, unlike persons working and residing in that State, does not receive a benefit corresponding to his previous net remuneration. Moreover, that court asks about the effect, on that analysis, of the fact that a frontier worker cannot assert a claim against his employer for the part of his previous gross salary he has not received because of that deduction.

27 As a preliminary point, it is necessary to set out the tax treatment of the insolvency benefit with respect to frontier workers such as Mr Eschenbrenner.

28 According to the referring court, it is common ground that, under Article 14(2)(1) of the Tax Convention, the power to tax social advantages awarded by the competent authorities of the Federal Republic of Germany, such as the insolvency benefit at issue, rests with that State. Similarly, it is apparent from the order for reference that, in this case, Mr Eschenbrenner is not in

fact subject to taxation in respect of that insolvency benefit in France.

29 Moreover, German tax legislation exempts that insolvency benefit from income tax, pursuant to Paragraph 3(2)(b) of the Law on income tax.

30 Thus, the award of the insolvency benefit in the circumstances at issue in the main proceedings is not formally subject to either double taxation or German income tax. It is, on the other hand, subject to the notional application of the tax which would have been deducted from Mr Eschenbrenner's salary had he been subject, during the period preceding the insolvency of his employer, to income tax in Germany.

31 In that regard, the circumstances of the dispute in the main proceedings differ from those at issue in the cases which gave rise to the judgments of 16 September 2004, *Merida* (C?400/02, EU:C:2004:537) and of 28 June 2012, *Erny* (C?172/11, EU:C:2012:399), which the referring court refers to, and which concerned situations in which the benefits at issue were actually subject to tax in both Member States. Indeed, unlike the circumstances at issue in the main proceedings, the power to tax the benefits at issue in the cases giving rise to those judgments belonged, under the Tax Convention, to one Member State, while those benefits were subject to a notional tax deduction in the other Member State (see, judgments of 16 September 2004, *Merida*, C?400/02, EU:C:2004:537, paragraphs 11 and 24, as well as of 28 June 2012, *Erny*, C?172/11, EU:C:2012:399, paragraph 34).

32 As regards, next, the principle of equal treatment, Article 45(2) TFEU states that freedom of movement for workers entails 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. That provision is given specific expression in Article 7(2) of Regulation No 492/2011 which states that a worker who is a national of a Member State is to enjoy, in the territory of the other Member States, the same social and tax advantages as national workers.

33 It must be noted, from the outset, that the calculation method, set out in Paragraph 167(2) of the SGB III, does not prescribe differences in treatment depending on the nationality of the workers concerned, the distinction between the different categories of workers being based, inter alia, on whether or not the worker is subject to tax in Germany.

34 Mr Eschenbrenner claims before the referring court, in essence, that Paragraph 167(2) of the SGB III, without amounting to direct discrimination on the ground of nationality, nevertheless has an unfavourable effect on him in comparison with the situation of persons working and residing in Germany who receive the same benefit.

35 In that regard, it must be noted that the principle of equal treatment laid down in both Article 45 TFEU and in Article 7 of Regulation No 492/2011 prohibits not only direct discrimination on the ground of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, judgment of 14 December 2016, *Bragança Linares Verruga and Others*, C?238/15, EU:C:2016:949, paragraph 41 and the case-law cited).

36 A provision of national law — even if it applies regardless of nationality — must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the migrant worker at a particular disadvantage, unless objectively justified and proportionate to the aim pursued (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C?514/12, EU:C:2013:799, paragraph 26, as well as the case-law cited).

37 In order to establish whether the insolvency benefit calculation method, set out in Paragraph 167(2) of the SGB III, amounts to a difference in treatment contrary to Article 45 TFEU and Article 7 of Regulation No 492/2011, it is therefore necessary to assess whether a frontier worker, such as Mr Eschenbrenner, is in a less favourable position than a person working and living in Germany, other things being equal.

38 According to the referring court, persons working and residing in Germany receive, in accordance with Paragraph 167(1) of the SGB III, an amount of insolvency benefit which corresponds, in principle, to their previous net remuneration.

39 By contrast, in the case of frontier workers who are not subject to income tax in Germany, such as Mr Eschenbrenner, the method for calculating the amount of the insolvency benefit applicable is set out in Paragraph 167(2) of the SGB III, according to which it is necessary, to this end, to deduct from that worker's previous remuneration the tax which would have been deducted from that remuneration had the worker been subject to income tax in Germany.

40 In accordance with the Tax Convention, Mr Eschenbrenner's remuneration was subject, while he was in employment, to income tax in France, the tax rate applicable in that Member State being, at the time of the facts in the main proceedings, lower than the rate applicable in Germany. Accordingly, in his case, the calculation method referred to in the previous paragraph, led, inevitably, to the insolvency benefit he received being different to his previous net remuneration.

41 As regards the compatibility of such a result with Article 45 TFEU and Article 7 of Regulation No 492/2011, it must be noted that, as was stated in paragraph 28 of the present judgment, in the present case, the power to tax the insolvency benefit belongs, in accordance with the Tax Convention, to the Federal Republic of Germany. The fact that that State exempts that benefit from tax, while requiring for the calculation of its amount a deduction corresponding to income tax at the rate in force in that State, does not alter in any way the finding that the national legislation at issue falls, in essence, within that State's power to tax.

42 Indeed, as the German Government stated during the hearing, that exemption and the notional deduction are prescribed, inter alia, to avoid, in the light of the number of applications for such a benefit in case of an undertaking's insolvency, a two-stage tax procedure consisting of first taking into account the gross amount of remuneration to calculate that benefit and then subjecting the insolvency benefit to income tax.

43 Similarly, although the method for calculating the amount of insolvency benefit of frontier workers, such as Mr Eschenbrenner, is set out in Paragraph 167(2) of the SGB III, namely a social law provision, it is nevertheless the case that that provision refers to income tax and requires that it be taken into account to calculate the amount of that benefit.

44 It follows that the effect of that national legislation on free movement of workers must be assessed in the light of the Court's case-law relating to tax measures.

45 Although it is true that Member States must exercise their competence in the area of direct taxation consistently with EU law and, in particular, with the fundamental freedoms guaranteed by the FEU Treaty (see judgment of 23 February 2016, *Commission* v *Hungary*, C?179/14, EU:C:2016:108, paragraph 171 and the case-law cited), it is nevertheless apparent from the Court's case-law that EU law does not preclude unfavourable consequences for free movement of workers that are the result of differences between tax scales in the Member States (see, to that effect, judgment of 12 May 1998, *Gilly*, C?336/96, EU:C:1998:221, paragraphs 47 and 53).

46 Thus, given the disparities between the Member States' legislation in this field, a worker's decision to rely on his freedom of movement under, in particular, Article 45 TFEU, can, depending on the circumstances, be more or less advantageous for such a worker from a tax point of view (see, by analogy, concerning the principle of non-discrimination, judgments of 15 July 2004, *Lindfors*, C?365/02, EU:C:2004:449, paragraph 34, and of 12 July 2005, *Schempp*, C?403/03, EU:C:2005:446, paragraph 45; of freedom of establishment, judgments of 6 December 2007, *Columbus Container Services*, C?298/05, EU:C:2007:754, paragraph 51, and of 28 February 2008, *Deutsche Shell*, C?293/06, EU:C:2008:129, paragraph 43; as well as free movement of capital, judgment of 7 November 2013, *K*, C?322/11, EU:C:2013:716, paragraph 80).

47 In the present case, while the insolvency benefit received by Mr Eschenbrenner is less than the net remuneration he received before the insolvency of his employer, that unfavourable consequence stems solely from the fact that the tax rate applicable in the Member State which awards the insolvency benefit and which has the power to tax that benefit was, at the time the amount of that benefit was set, higher than that applied by the Member State in which Mr Eschenbrenner resided when he was in employment.

48 Moreover, the effect of differing tax rules, such as those at issue in the main proceedings, on the amount of the insolvency benefit received by a frontier worker, such as Mr Eschenbrenner, is uncertain in that it depends of the particularities of each individual case. Indeed, that amount is likely to be higher or lower than the previous net remuneration of that worker depending on the tax rate in force in the Member States at issue.

49 Consequently, to the extent that the unfavourable consequence at issue in the main proceedings stems solely from the differences between the tax scales in the Member States at issue, Article 45 TFEU and Article 7 of Regulation No 492/2011 do not preclude legislation such as that at issue in the main proceedings.

50 That finding is not called into question by the considerations relating to Directive 2008/94 mentioned by the referring court.

51 Pursuant to Article 1(1) of Directive 2008/94, that directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency.

52 According to the Court's well-established case-law, the social objective of that directive is to guarantee employees a minimum of protection at European Union level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period (see judgment of 17 November 2011, *van Ardennen*, C?435/10, EU:C:2011:751, paragraph 27 and the case-law cited, as well as, to that effect, judgment of 24 November 2016, *Webb-Sämann*, C?454/15, EU:C:2016:891, paragraphs 32 and 35).

53 The Member States are thus bound to ensure, within the limit of a ceiling they are entitled to set to guarantee outstanding claims, that all those claims are paid (see, to that effect, judgment of 4 March 2004, *Barsotti and Others*, C?19/01, C?50/01 and C?84/01, EU:C:2004:119, paragraph 36).

54 Nevertheless, while guarantee institutions must thus take responsibility for outstanding pay, pursuant inter alia to Article 3 of Directive 2008/94, it is for national law to specify what is meant by the term‘pay’and to define what it includes (see judgment of 16 July 2009, *Visciano*, C?69/08, EU:C:2009:468, paragraph 28 and the case-law cited).

55 Consequently, it is for Member States’ national law to specify the tax treatment of outstanding remuneration where it becomes the responsibility of guarantee institutions in accordance with Directive 2008/94. The scheme thus defined must not, however, adversely affect the social objective of that directive, as referred to in paragraph 52 of the present judgment, and, more broadly, respect for EU law.

56 It follows from the above that Directive 2008/94 does not require Member States to guarantee a worker a benefit, in the event of the employer’s insolvency, in the amount of that worker’s previous gross remuneration, including, inter alia, the part of the remuneration relating to tax.

57 In these circumstances, it must be held that Directive 2008/94 also does not require the worker to have a claim against his employer corresponding to the tax-related part of his previous gross salary which is not covered by the insolvency benefit awarded.

58 Similarly, that situation has no effect on the answer to be given to the referring court regarding the compatibility of the national legislation at issue with Article 45 TFEU and Article 7 of Regulation No 492/2011. Those provisions do not require a frontier worker, such as Mr Eschenbrenner, to receive insolvency benefit corresponding to his previous gross salary, as is apparent from the finding in paragraph 49 of the present judgment, and, therefore, they also do not require that worker to have, in circumstances such as those at issue in the main proceedings, a claim against his employer corresponding to the part of his previous gross salary not covered by the insolvency benefit awarded.

59 Having regard to the foregoing considerations, the answer to the first question is that Article 45 TFEU and Article 7 of Regulation No 492/2011 must be interpreted as not precluding, in circumstances such as those at issue in the main proceedings, the amount of the insolvency benefit awarded by a Member State to a frontier worker who is not subject to income tax in that State, and for whom that benefit, under the provisions applicable to him, is not taxable, from being determined by deducting income tax, as it applies in that State, from the remuneration used to calculate that benefit, with the consequence that that frontier worker, unlike persons working and residing in that State, does not receive a benefit corresponding to his previous net remuneration. The fact that that worker does not have a claim against his employer corresponding to the part of his previous gross salary which he has not received because of that deduction has no effect in that regard.

The second question

60 In the light of the answer to the first question, there is no need to answer the second question.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 45 TFUE and Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as not precluding, in circumstances such as those at issue in the main proceedings, the amount of the insolvency benefit awarded by a Member State to a frontier worker who is not subject to income tax in that State, and for whom that benefit, under the provisions applicable to him, is not taxable, from being determined by deducting income tax, as it applies in that State, from the remuneration used to calculate that benefit, with the consequence that that frontier worker, unlike persons working and residing in that State, does not receive a benefit corresponding to his previous net remuneration. The fact that that worker does not have a claim against his employer corresponding to the part of his previous gross salary which he has not received because of that deduction has no effect in that regard.

[Signatures]

* Language of the case: German.