

JUDGMENT OF THE COURT (Third Chamber)

8 May 2019 (\*)

(Reference for a preliminary ruling — Social security for migrant workers — Regulation (EC) No 883/2004 — Article 11(3)(e) — National of a Member State employed as a seaman on board a vessel flying the flag of a third State — Employer established in a Member State other than the worker's State of residence — Determination of the applicable legislation)

In Case C-631/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 27 October 2017, received at the Court on 9 November 2017, in the proceedings

**SF**

v

**Inspecteur van de Belastingdienst,**

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen (Rapporteur), J. Malenovský, C.G. Fernlund and L.S. Rossi, judges,

Advocate General: G. Pitruzzella,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 November 2018,

after considering the observations submitted on behalf of:

- SF, by V.J. de Groot and H. Menger, tax advisors,
- the Netherlands Government, by M.K. Bulterman and M.L. Noort, acting as Agents,
- the Greek Government, by E.-M. Mamouna, acting as Agent,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by M. van Beek and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2019,

gives the following

**Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004').

- 2 The request has been made in the course of proceedings between SF and the Inspecteur van de Belastingdienst (Inspector of Taxes, Netherlands, 'the Inspector') concerning SF's affiliation to the Netherlands general social insurance scheme for the period from 13 August to 31 December 2013.

### **Legal context**

- 3 Title II of Regulation No 883/2004 sets out the rules for determining the applicable social security legislation and includes Articles 11 to 16 of that regulation.

- 4 Article 11 of that regulation, headed 'General rules', provides:

'1. Persons to whom this regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

...

3. Subject to Articles 12 to 16:

- (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
- (b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him/her is subject;
- (c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;
- (d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
- (e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.

4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he/she resides in that State. ...

...'

- 5 Articles 12 to 16 of Regulation No 883/2004 lay down special rules applicable to persons who have been posted (Article 12), persons pursuing an activity in two or more Member States (Article 13), persons who elected voluntary insurance or optional continued insurance (Article 14), contract staff of the European institutions (Article 15) and exceptions to Articles 11 to 15 of that regulation (Article 16).

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 6 From 13 August to 31 December 2013, SF, a Latvian national residing in Latvia, worked as a steward for Oceanwide Offshore Services B. V., an undertaking established in the Netherlands.

- 7 SF carried on that activity on board a vessel flying the flag of the Bahamas which, during that period, sailed over the German part of the continental shelf of the North Sea.
- 8 The Netherlands tax authorities issued SF with a notice of assessment for 2013 in respect of income tax and social insurance contributions. Following a complaint made by SF against that assessment, the Inspector upheld the notice only in so far as it declares SF to be liable for the social contributions to the Netherlands social insurance scheme for the period from 13 August to 31 December 2013.
- 9 SF brought an appeal before the Rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant, Netherlands) against the Inspector's decision, arguing that he does not come under that scheme.
- 10 Faced with the question whether SF was actually liable for those contributions and since it had doubts in that respect, that court decided to refer preliminary questions to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- 11 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) considers that, even though SF's professional activity during the period in question may not be regarded as having taken place in the territory of an EU Member State, there is a sufficiently close connection with EU territory for Regulation No 883/2004 to apply to the present case. That court also considers that SF comes within the scope *ratione personae* of that regulation.
- 12 According to that court, the situation which arose in the case pending before the Rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant), in which the salaried activity of the worker in question is performed on a vessel flying the flag of a third State, does not fall within the scope of Article 11(3)(a) to (d), nor that of Article 11(4) of Regulation No 883/2004.
- 13 It considers that such a situation may, however, fall within the scope of Article 11(3)(e) of Regulation No 883/2004, which provides that any other persons to whom subparagraphs (a) to (d) of Article 11(3) do not apply are to be subject to the legislation of the Member State of residence.
- 14 In that regard, the referring court stated that it heard arguments to the effect that Article 11(3)(e) of Regulation No 883/2004 does not apply to a situation such as the one in the main proceedings, given that it is clear from the Explanatory notes on modernised social security coordination — Commission Regulations (EC) No 883/2004 and (EC) No 987/2009, for the month of January 2011, that that provision applies only to economically non-active persons.
- 15 That court considers, however, that such an interpretation is not apparent from the wording of the provision at issue, which is a conflict rule formulated in general terms and which applies, by default, to persons other than those referred to in Article 11(3)(a) to (d) and Articles 12 to 16 of Regulation No 883/2004.
- 16 It was further argued before the referring court that, although they do not apply directly, Article 11(3)(a) and Article 11(4) of Regulation No 883/2004 should apply by analogy and lead to the designation of the law of the Member State in which the employer is established, in the same way as the Court of Justice held in its judgments of 29 June 1994, *Aldewereld* (C-60/93, EU:C:1994:271), and of 19 March 2015, *Kik* (C-266/13, EU:C:2015:188), with regard to the provisions of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) ('Regulation No 1408/71'). However, that court considers that the system of conflict-of-law rules introduced by Regulation No 883/2004 is more complete and does not contain any lacunae, such that it is not necessary, in the present case, to draw on that case-law.

17 Nevertheless, the referring court considers that doubts remain over the interpretation of the provisions of Regulation No 883/2004 for the purposes of determining the applicable legislation in a situation such as the one at issue in the main proceedings.

18 In the light of those considerations, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Which legislation applies under Regulation No 883/2004 in a situation where the interested party (a) resides in Latvia, (b) has Latvian nationality, (c) is employed by an employer established in the Netherlands, (d) works as a seafarer, (e) works on board a vessel flying the flag of the Bahamas, and (f) performs those activities outside the territory of the European Union?'

### **Consideration of the question referred for a preliminary**

19 By its question, the referring court asks, in essence, whether Article 11(3)(e) of Regulation No 883/2004 must be interpreted to the effect that a situation such as the one at issue in the main proceedings in which a person, whilst working as a seaman for an employer established in a Member State on board a vessel flying the flag of a third State and travelling outside of the territory of the European Union, maintained his residence in his Member State of origin, falls within the scope of that provision, such that the applicable national legislation is that of the Member State of residence of that person.

20 It should be noted at the outset that, where a person falls within the scope *ratione personae* of Regulation No 883/2004, as defined in Article 2 thereof, the rule in Article 11(1) of that regulation that the legislation of a single Member State is to apply is, in principle, appropriate, and the national legislation applicable is determined in accordance with the provisions of Title II of that regulation (see, to that effect, judgments of 19 March 2015, *Kik*, C-266/13, EU:C:2015:188, paragraph 47 and the case-law cited, and of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 42 and the case-law cited).

21 In the present case, it is clear from the file before the Court that, during the period at issue in the main proceedings, SF, whilst maintaining his residence in his Member State of origin, that is to say, Latvia, worked as a seaman for an employer established in another Member State, that is to say, the Netherlands, on board a vessel flying the flag of a third State, travelling outside of EU territory.

22 In that regard, the Court has already held that the mere fact that a worker carries on his activities outside the territory of the European Union is not sufficient to exclude the application of the EU rules on free movement of workers, in particular Regulation No 883/2004, as long as the employment relationship retains a sufficiently close connection with that territory (see, to that effect, judgment of 19 March 2015, *Kik*, C-266/13, EU:C:2015:188, paragraph 42 and the case-law cited).

23 According to the case-law of the Court, a sufficiently close connection between the employment relationship in question and the territory of the European Union derives, *inter alia*, from the fact that an EU citizen, who is resident in a Member State, has been engaged by an undertaking established in another Member State on whose behalf he carries on his activities (judgment of 19 March 2015, *Kik*, C-266/13, EU:C:2015:188, paragraph 43 and the case-law cited).

24 As the referring court stated, it follows that, even though in the present case SF's activities were carried on outside EU territory, the employment relationship at issue retains a sufficiently close link with that territory, given that, during the period at issue, SF had maintained his residence in Latvia and his employer was established in the Netherlands.

25 Accordingly, a situation such as the one at issue in the main proceedings must be regarded as falling within the scope of Regulation No 883/2004 and the national legislation applicable in

the main proceedings must, therefore, be determined in accordance with the provisions of Title II of that regulation.

- 26 In the present case, it is common ground that a person such as SF does not come under the special rules under Articles 12 to 16 of Regulation No 883/2004 concerning persons who have been posted, those pursuing an activity in two or more Member States, those who elected voluntary or optional insurance, or those who are contract staff of the European institutions.
- 27 Moreover, the interested person does not come under the situations covered by subparagraphs (a) to (d) of Article 11(3) of Regulation No 883/2004 concerning persons pursuing an activity as an employed person in a Member State, civil servants, persons receiving unemployment benefits, or persons called up or recalled for service in the armed forces or for civilian service in a Member State.
- 28 In addition, since SF works as a seaman on board a vessel flying the flag of a third State, he also falls outside the general rule in Article 11(4) of Regulation No 883/2004 designating the legislation of the flag Member State with regard to seafarers (see, to that effect, judgment of 19 March 2015, *Kik*, C-266/13, EU:C:2015:188, paragraph 56).
- 29 As to the question whether Article 11(3)(e) of Regulation No 883/2004 applies to situation such as the one at issue in the main proceedings, it should be noted that, according to the settled case-law of the Court, it is necessary, in order to interpret a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgments of 15 October 2014, *Hošťická and Others*, C-561/13, EU:C:2014:2287, paragraph 29 and the case-law cited, and of 19 September 2018, *González Castro*, C-41/17, EU:C:2018:736, paragraph 39 and the case-law cited), while the origins of the provision may also provide information relevant to its interpretation (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 50 and the case-law cited).
- 30 It is apparent from the wording of Article 11(3)(e) of Regulation No 883/2004 that 'any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States'.
- 31 As the Advocate General stated in points 34 and 35 of his Opinion, it follows from a literal analysis of that provision that the EU legislature used general terms, in particular the words 'any other person' and 'without prejudice to other provisions of this Regulation', in order to make Article 11(3)(e) a residual rule which is intended to apply to all persons who find themselves in a situation which is not specifically governed by other provisions of that regulation and to introduce a complete system for determining the applicable legislation.
- 32 Furthermore, the wording of that provision does not make any provision for limiting its scope to economically non-active persons.
- 33 With regard to the objectives pursued by Regulation No 883/2004, it should be noted that, in accordance with settled case-law, the provisions of Title II of Regulation No 883/2004, of which Articles 11 to 16 form a part, constitute a complete and uniform system of conflict rules which are intended not only to prevent the simultaneous application of a number of national legislative systems and the complication which might ensue, but also to ensure that the persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (judgments of 14 June 2016, *Commission v United Kingdom*, C-308/14, EU:C:2016:436, paragraph 64, and of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 41 and the case-law cited).
- 34 More particularly, as regards Article 11(3) of Regulation No 883/2004, the Court has held that the purpose of that provision is to determine the national legislation applicable to persons who are in one of the situations referred to in subparagraphs (a) to (e) of Article 11(3) (judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 43 and the case-law cited).

- 35 It is true that the Court has held that Article 11(3)(e) of Regulation No 883/2004 applies, inter alia, to economically non-active persons (see, to that effect, judgments of 14 June 2016, *Commission v United Kingdom*, C-308/14, EU:C:2016:436, paragraph 63).
- 36 However, as the Advocate General stated in points 44 and 45 of his Opinion, a restrictive interpretation of Article 11(3)(e) of Regulation No 883/2004 limiting its scope solely to economically non-active persons may deprive persons who do not come under the situations referred to in subparagraphs (a) to (d) of Article 11(3) or other provisions of Regulation No 883/2004 of social security cover because there is no legislation which is applicable to them.
- 37 With regard to the origins of Article 11(3)(e) of Regulation No 883/2004, which are set against a background of modernisation and simplification of the rules contained in Regulation No 1408/71, it should be pointed out, as the Advocate General also stated in point 49 of his Opinion, that that provision replaced Article 13(2)(f) of Regulation No 1408/71, which provided that 'a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17, shall be subject to the legislation of the Member State in whose territory he resides'.
- 38 In that regard, it should be recalled that Article 13 of Regulation No 1408/71, and more particularly paragraph 2(f) thereof, was given a broad interpretation in order to achieve the aim of the legislation of which it forms part, which is to prevent persons who come within the scope of that regulation being left without social security cover because there is no legislation which is applicable to them (see, to that effect, judgment of 11 June 1998, *Kuusijärvi*, C-275/96, EU:C:1998:279, paragraph 40).
- 39 Article 11(3)(e) of Regulation No 883/2004 pursues the same objective and, to the extent that that provision is worded in terms broader than those used in Article 13(2)(f) of Regulation No 1408/71, in that it expressly covers persons who are in a situation which does not come under the other provisions of that regulation, it cannot be interpreted restrictively.
- 40 Consequently, Article 11(3)(e) of Regulation No 883/2004 must be interpreted to the effect that it applies to all persons who are not covered by subparagraphs (a) to (d) of that provision and not only those who are economically non-active.
- 41 As the Advocate General stated in point 50 of his Opinion, that interpretation cannot be called into question by the Explanatory notes of the Commission, referred to in paragraph 14 above, or the Practical guide — The applicable legislation in the EU, EEA and in Switzerland, drawn up and approved by the Administrative Commission for the Coordination of Social Security Systems and published in December 2013. Even though those documents are useful tools for interpreting Regulation No 883/2004, they are not legally enforceable and cannot, therefore, bind the Court in the interpretation of that regulation.
- 42 In view of the foregoing, a situation such as the one at issue in the main proceedings is governed by Article 11(3)(e) of Regulation No 883/2004 which stipulates that the applicable national legislation is that of the Member State of residence of the interested party.
- 43 That finding cannot be called into question by the fact, raised by the Netherlands Government at the hearing, that some Member States make the interested party's affiliation to the national social security scheme subject to the condition that he must work as an employee on their territory, so that, in a situation such as the one at issue in the main proceedings, the interested party may not be affiliated to a social security scheme and may be left without social protection.
- 44 In the present case, it is not apparent from the file before the Court that the national legislation of the Member State of residence of the interested party makes provision for such a condition.

- 45 In any event, it is clear from the settled case-law of the Court that, although it is for the legislation of each Member State to lay down the conditions for creating the right to become affiliated to a social security scheme, the Member States are nevertheless required to abide by the provisions of EU law in force when setting those conditions. In particular, the conflict rules laid down by Regulation No 883/2004 are mandatory for the Member States, and the latter do not have the option to determine to what extent their own legislation or that of another Member State is applicable (see, to that effect, judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraphs 47 and 48 and the case-law cited).
- 46 Accordingly, the conditions establishing the right to affiliate to a social security scheme cannot have the effect of excluding from the scope of the legislation at issue persons to whom, pursuant to Regulation No 883/2004, that legislation is applicable (judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 49 and the case-law cited).
- 47 In the light of all of the foregoing considerations, the answer to the question referred is that Article 11(3)(e) of Regulation No 883/2004 must be interpreted to the effect that a situation such as the one at issue in the main proceedings in which a person, whilst working as a seaman for an employer established in a Member State on board a vessel flying the flag of a third State and travelling outside of the territory of the European Union, maintained his residence in his Member State of origin, falls within the scope of that provision, such that the applicable national legislation is that of the Member State of residence of that person.

#### **Costs**

- 48 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 (Third Chamber) hereby rules:

**Article 11(3)(e) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted to the effect that a situation such as the one at issue in the main proceedings in which a person, whilst working as a seaman for an employer established in a Member State on board a vessel flying the flag of a third State and travelling outside of the territory of the European Union, maintained his residence in his Member State of origin, falls within the scope of that provision, such that the applicable national legislation is that of the Member State of residence of that person.**

[Signatures]

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\* Language of the case: Dutch.