ECLI:EU:C:2019:49

Provisional text

23 January 2019 (*)

(Reference for a preliminary ruling — Free movement of workers — Equal treatment — Income tax — Social security contributions — Worker who left the Member State of her employment during the course of the calendar year — Application of the pro rata temporis rule to social security credit)

In Case C-272/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 12 May 2017, received at the Court on 18 May 2017, in the proceedings

K.M. Zyla

v

Staatssecretaris van Financiën,

THE COURT (Tenth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Tenth Chamber, F. Biltgen and E. Levits (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 30 May 2018,

after considering the observations submitted on behalf of:

– Ms Zyla, by S.C.W. Douma, Professor,

– the Netherlands Government, by M.L. Noort and M.K. Bulterman, acting as Agents,

– the European Commission, by M. van Beek and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

2 The request has been made in the context of a dispute between Ms K.M. Zyla and the Staatssecretaris van Financiën (Secretary of State for Finance, Netherlands) concerning the pro rata calculation of the social security component of the tax credit to which she is entitled.

Legal context

EU law

3 According to Article 3(1) 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):

‘This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

(b) maternity and equivalent paternity benefits;

(c) invalidity benefits;

(d) old-age benefits;

...’

4 Article 4 of that regulation provides:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

5 Article 5(a) of that regulation is worded as follows:

‘Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State.’

6 Title II of Regulation No 883/2004, entitled ‘Determination of the legislation applicable’, includes Article 11, which 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;

...

(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, ...’

Netherlands law

7 Under Article 8.1 of the Wet op de inkomstenbelasting 2001 (2001 Law on Income Tax), income tax and social security contributions are collected by the tax authorities by means of a levy referred to in that article as a combined tax. The total amount of that ‘combined tax’ payable by a person is calculated by adding the amount of tax on income from employment and from other sources such as residential property and savings, to the amount of social security contributions. That article provides that the rate of the ‘combined tax’ is the sum of the tax rate for the first band of income and the rates of the applicable contributions. The law also provides that the amount of that ‘combined tax’ can be reduced; the ‘combined tax credit’ is defined under the same article as the sum of the amount of income tax credit and the amount of social security contributions credit.

8 In accordance with Article 8.10 of the 2001 Law on Income Tax, the ‘general tax credit’ applies to all taxpayers. In 2013 it amounted to EUR 2 001.

9 Social security contributions are governed by the Algemene Ouderdomswet (General Law on old-age pensions), the Algemene Nabestaandenwet (General Law on survivors’ pensions) and the Algemene Wet Bijzondere Ziektekosten (General Law on exceptional medical expenses). Persons insured under those three insurance schemes are Netherlands residents and non-residents who are subject to income tax by reason of employment in that Member State.

10 Article 9 of the Wet financiering sociale verzekeringen (Law on the Financing of Social Security; ‘the WFSV’) provides:

‘The social security contributions payable are those due after they have been reduced by the amount of the social security component of the tax credit applicable to persons liable to pay contributions.’

11 Article 12(1)(a) to (c) of the WFSV determines how the social security component of the ‘general tax credit’ is applied. Article 12(3) stipulates that all persons who have paid contributions throughout the calendar year are entitled to that credit.

12 Article 2.6a of the Regeling Wet financiering sociale verzekeringen (Decree implementing the WFSV; ‘the implementing decree’) provides:

‘In the case of persons who are not liable to pay social security contributions for part of the calendar year (for reasons other than death), the tax credit referred to in Article 12(1)(a), (b) and (c) of the WFSV shall be calculated pro rata, that is, in proportion to the period during which contributions were actually paid in the calendar year.’

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

13 Ms Zyla, who is of Polish nationality, worked in the Netherlands from 1 January 2013 to 21 June 2013. During that time she was insured under the Netherlands general social security system and was liable to pay the corresponding social security contributions. Ms Zyla then returned to Poland, where she took up residence but performed no paid work in 2013.

14 Ms Zyla received an income of EUR 9 401 for the work she performed in the Netherlands in 2013. A wage levy of EUR 1 399 was withheld at source from that amount. Ms Zyla was also liable in the amount of EUR 2 928 in respect of social security contributions. When her tax assessment was made for that year, as a person resident in the Netherlands she benefited, under national law, from a general tax credit on both income tax and social security contributions. An amount of EUR 1 254 in general tax credit and an amount of EUR 840 in employed person’s tax credit was therefore deducted from the income tax and social security contributions due. The referring court notes that, since Ms Zyla was no longer liable to pay social security contributions from 22 June 2013, the tax authorities, in accordance with Article 2.6a of the implementing decree, reduced the contributions component of the general tax credit pro rata in line with Ms Zyla’s period of compulsory contribution in 2013.

15 Ms Zyla brought an action before the rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant, Netherlands) against that tax assessment, claiming that Article 2.6a of the implementing decree leads to a difference in treatment between residents and non-residents and constitutes a barrier to the free movement of workers guaranteed under Article 45 TFEU. After that action had been dismissed, Ms Zyla appealed against the judgment to the Gerechtshof ’s-Hertogenbosch (Court of Appeal, ’s-Hertogenbosch, Netherlands). The appeal court also rejected the Ms Zyla’s claims on the ground that, since she had been employed in the Netherlands, within the meaning of Article 45 TFEU, for only a short period of time, she could not claim the full amount of the social security component of the general tax credit. The appeal court also noted that the national legislation which provides for this limitation on the amount of the general tax credit does not establish any difference in treatment, since the amount of the tax credit depends on whether or not a person is insured under the national social security system and the length of the contribution period.

16 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which Ms Zyla has brought an appeal in cassation, is uncertain whether the partial credit applied with regard to Ms Zyla complies with EU law and particularly with the case-law of the Court of Justice.

17 The referring court takes the view that Article 45 TFEU could be interpreted as not precluding the application of a credit on social security contributions in proportion to the taxpayer’s period of insurance, but is nevertheless uncertain whether a worker who earned all of his annual income in a Member State in which he does not reside or no longer resides should be entitled to the full social security component of the tax credit, even though that worker was not insured under the Member State’s social security system during the whole year.

18 In those circumstances, 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:

‘Must Article 45 TFEU be interpreted as precluding legislation of a Member State under which a worker who, pursuant to [Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and to members of their families moving within the Community, as amended by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),] or Regulation No 883/2004, is insured under the social security system of the Member State concerned for part of a calendar year, and who, when the contributions for that insurance are levied, is entitled to only a portion of the contributions component of the general tax credit which is determined on a time-proportionate basis in relation to the period of insurance, if that worker, for the remainder of the calendar year, was not insured under the social security system of that Member State, and was resident in another Member State for the remainder of the calendar year and earned (virtually) his entire annual income in the first-mentioned Member State?’

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether Article 45 TFEU should be interpreted as precluding legislation of a Member State which, in order to establish the amount of social security contributions payable by a worker, provides that the social security component of the tax credit to which a worker is entitled for a calendar year is proportionate to the period during which the worker was insured under the social security system of that Member State, thus excluding from that annual credit the fraction proportionate to any period during which that worker was not insured under that social security system and lived in another Member State where he did not engage in any professional activity.

20 It is settled case-law that an EU citizen who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and been employed in a Member State other than that of his origin comes within the scope of Article 45 TFEU (judgment of 7 March 2018, *DW*, C-651/16, EU:C:2018:162, paragraph 18 and the case-law cited).

21 It follows that the situation of Ms Zyla, a Polish national who moved to the Netherlands to work as an employed person from 1 January 2013 to 21 June 2013, comes within the scope of Article 45 TFEU.

22 It is also clear from the Court’s case-law that all of the provisions of the FEU Treaty relating to the freedom of movement of persons are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the European Union, and preclude measures which might place them at a disadvantage when they wish to pursue an economic activity in another Member State (judgment of 7 March 2018, *DW*, C-651/16, EU:C:2018:162, paragraph 21 and the case-law cited).

23 Accordingly, provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 18, and of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 15 and the case-law cited).

24 In that regard it must be borne in mind, as the Netherlands Government noted in its written observations, that the principle of equal treatment enshrined in Article 45 TFEU prohibits not only

overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact lead to the same result. Unless objectively justified and proportionate to the aim pursued, 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 (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraphs 25 and 26).

25 In the present case, Article 2.6a of the implementing decree affects in the same way all persons not liable to pay social security contributions during part of the calendar year, without making a distinction on the basis of their nationality. As the Advocate General noted in point 47 of his Opinion, that provision does not, therefore, directly discriminate on the basis of nationality.

26 However, in order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States to the exclusion of nationals of the State in question (see, to that effect, judgment of 18 December 2014, *Larcher*, C-523/13, EU:C:2014:2458, paragraph 32 and the case-law cited). In addition, it follows from the case-law cited in paragraphs 22 and 23 above that even non-discriminatory obstacles to the freedom of movement for workers are, in principle, prohibited by Article 45 TFEU.

27 In the present case, in order to determine whether Article 2.6a of that decree is indirectly discriminatory or an obstacle to the freedom of movement for workers, it is necessary to establish, first, whether that provision relates to tax or social security, since the applicable EU law rules differ in each case.

28 In that regard, it must be noted, as has been stated in paragraphs 7 and 14 above, that the social security component of the tax credit is set out in legislation on the establishment of income tax which combines both the system of collection of personal income tax from those liable to pay it and that of the collection of their social security contributions.

29 However, even if taxes and social security contributions are levied jointly, tax revenues benefit government resources generally, whereas the social security contributions levied provide the funds for the specific social security benefits in respect of which they are levied. The referring court explains that, in the tax credit system, the tax component of the tax credit is distinguished from the social security contributions component of the tax credit. It adds that, under Article 12(1) of the WFSV, an entitlement to the contributions component of the tax credit exists only if the person concerned is liable to pay social security contributions.

30 Consequently, the legislation at issue in the main proceedings concerns levies allocated specifically and directly to the funding of social security. That legislation therefore has a direct and sufficiently relevant link to the laws which govern the branches of social security listed in Article 3 of Regulation No 883/2004 and thus comes within the scope of that regulation (see, to that effect, judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 27 and the case-law cited). The dispute in the main proceedings thus concerns a possible restriction on the freedom of movement for workers as a result of a social security measure which forms an integral part of the national social security system.

31 In those circumstances, the principles derived from the case-law concerning the conditions governing liability for payment of tax on income from employment, in particular from the judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31) and of 16 October 2008,

Renneberg (C-527/06, EU:C:2008:566), relied on by Ms Zyla in her observations, are not applicable in a situation such as that in the main proceedings.

32 That assessment is not called into question by the fact, noted by the referring court, that a compensation mechanism allows part of the social security contribution credit to be set off against income tax, reducing the latter where the amount of social security contributions is less than the reduction applicable to those contributions.

33 The Court has previously held that persons insured under the Netherlands social security system are entitled only in exceptional circumstances to tax credits in respect of social security, since it is only in a situation where an insured person cannot set off reductions in contributions against contributions due that that person can claim such tax credits (see, to that effect, judgment of 8 September 2005, *Blanckaert*, C-512/03, EU:C:2005:516, paragraph 47). It follows that the existence of the compensation mechanism identified in paragraph 32 above does not affect the nature of the social security credit provided for in Netherlands law, which, as the Advocate General noted in point 56 of his Opinion, is specifically intended to offset the economic effort which social security contributions represent for workers.

34 That being so, it is clear from settled case-law that, although, in principle, Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe EU law and, in particular, the provisions of the FEU Treaty on the free movement of workers and the right of establishment (see, inter alia, judgment of 13 July 2016, *Pöpperl*, C-187/15, EU:C:2016:550, paragraph 22 and the case-law cited).

35 As the national legislation at issue in the main proceedings forms part of the Netherlands social security system, it is necessary to determine, second, whether, as such, it is indirectly discriminatory or an obstacle to the free movement of workers.

36 In that regard, as was explained in paragraph 30 above, Ms Zyla's situation comes within the scope of the social security coordination rules resulting from Regulation No 883/2004.

37 It must be noted in this regard that, in order to ensure the free movement of employed and self-employed persons within the European Union, while upholding the principle of equal treatment of those persons under the various measures of national legislation, Regulation No 1408/71, and then Regulation No 883/2004, have established a system of coordination concerning, inter alia, the determination of the legislation applicable to employed persons who make use, under various circumstances, of their right to freedom of movement (judgment of 26 February 2015, *de Ruyter,* C-623/13, EU:C:2015:123, paragraph 34 and the case-law cited).

38 The completeness of that system of conflict rules has the effect of divesting the legislature of each Member State of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 35 and the case-law cited).

39 In the case in the main proceedings, in accordance with Article 11(1) and (3)(a) of Regulation No 883/2004, Ms Zyla, while she worked as an employed person in the Netherlands, was subject to the legislation of that Member State and insured under the Netherlands social security system. Because of this insurance, Ms Zyla was able to benefit, during that period, from the social security component of the tax credit. However, as Ms Zyla ceased to be insured under the Netherlands social security system and, accordingly, was no longer liable to pay contributions after she left the

Netherlands and returned to her Member State of origin, she did not, in application of Article 2.6a of the implementing decree, benefit from the whole amount of the social security component of the tax credit.

40 Therefore, it is only as regards the second part of 2013 that the legislation at issue in the main proceedings led to a difference in treatment between Ms Zyla and a person insured under the Netherlands social security system for the whole of that year. Such a person, even if, like Ms Zyla, he no longer received income during that second part of the year, was entitled to the whole tax credit relating to social security contributions, set off as a matter of priority against his social security contributions or, alternatively, against his taxes. This implies that, with equivalent income, the application in its entirety of the social security component of the tax credit to a person insured during the whole year under the Netherlands social security system leads to a social security or even tax obligation that is less than that borne by a person who ceases to be insured under that social security system during the same year.

41 However, in the light of the rule, set out in Article 11(1) of Regulation No 883/2004, that the social security legislation of a single Member State is to apply, and the rule, set out in paragraph 3(e) of that article, that a person who does not pursue an activity as an employed or self-employed person is subject only to the social security legislation of the Member State of residence, a person in Ms Zyla's situation could no longer belong to the Netherlands social security system after ceasing to work in that Member State and ceasing to reside there.

42 It follows that, as the Advocate General correctly noted in point 63 of his Opinion, in the light of the nature of the legislation at issue, an objective difference must be found to exist between the situation of a person who, like Ms Zyla, ceased to be insured under the Netherlands social security system during the year, and a worker who remained insured under that social security system throughout the whole of that same year.

43 Furthermore, the Court has held that it falls within the internal process of a national social security system to allow entitlement to reductions in contributions only to persons liable to pay them, that is to say, persons insured under that system (judgment of 8 September 2005, *Blanckaert*, C-512/03, EU:C:2005:516, paragraph 49).

44 Moreover, as has been noted in paragraph 22 above, the provisions of the Treaty on the freedom of movement of persons are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the European Union, and preclude measures that might place EU citizens at a disadvantage when they wish to pursue an activity in a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the FEU Treaty, to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an activity there (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited).

45 However, primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 34 and the case-law cited). EU law guarantees only that workers active in a Member State other than their Member State of origin are subject to the same conditions as workers of that other State.

46 In the light of the foregoing, Article 2.6a of the implementing decree cannot be regarded either as a provision that is indirectly discriminatory or as an obstacle to the free movement of workers, prohibited by Article 45 TFEU.

47 Lastly, contrary to the European Commission's submissions, that assessment is not called into question by the judgment of 26 January 1999, *Terhoeve* (C-18/95, EU:C:1999:22), or the judgment of 8 May 1990, *Biehl* (C-175/88, EU:C:1990:186).

48 The first of those two judgments concerned the social security contributions payable by a worker who was merely seconded from his Member State of origin and who, consequently, in application of the coordination rules provided for in Regulation No 1408/71, remained during the whole of the period at issue insured under the social security system of that Member State despite his secondment to another Member State. Such a situation is fundamentally different from a situation in which, as in the present case, a worker ceases to be insured under the social security system of a Member State after having ended his professional activity there and moved his residence to another Member State.

49 Regarding the second judgment, suffice it to note that the difference in treatment at issue in that case, unlike that at issue in the present case, was unrelated to the national social security system and, accordingly, was not covered by the system of coordination of the rules concerning social security legislation provided for by Regulation No 1408/71, replaced since then by Regulation No 883/2004.

50 In those circumstances, the answer to the question referred is that Article 45 TFEU must be interpreted as not precluding legislation of a Member State which, with a view to establishing the amount of social security contributions payable by a worker, provides that the social security component of the tax credit to which a worker is entitled for a calendar year is to be proportionate to the period during which that worker was insured under the social security system of that Member State, thus excluding from that annual credit a fraction proportionate to the period during which that worker was not insured under that system and lived in another Member State where he did not engage in professional activity.

Costs

51 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 (Tenth Chamber) hereby rules:

Article 45 TFEU must be interpreted as not precluding legislation of a Member State which, with a view to establishing the amount of social security contributions payable by a worker, provides that the social security component of the tax credit to which a worker is entitled for a calendar year is to be proportionate to the period during which that worker was insured under the social security system of that Member State, thus excluding from that annual credit a fraction proportionate to the period during which that worker was not insured under that social security system and lived in another Member State where he did not engage in professional activity.

[Signatures]

* Language of the case: Dutch.