



Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 26 February 2019¹

Case C-33/18

V

v

**Institut national d'assurances sociales pour travailleurs indépendants,
Securex Integrity ASBL**

(Request for a preliminary ruling from the cour du travail de Liège (Belgium))

(Reference for a preliminary ruling — Social security for migrant workers — Regulation (EC) No 883/2004 — Transitional provisions — Article 87(8) — Regulation (EEC) No 1408/71 — Article 14c(b) — Derogations from the principle that the legislation of a single Member State is to apply — Dual affiliation — Submission of request to be subject to the legislation applicable pursuant to Regulation No 883/2004)

1. This case concerns a request for a preliminary ruling from the cour du travail de Liège (Higher Labour Court, Liège, Belgium) on the interpretation of Article 87(8) of Regulation (EC) No 883/2004 on the coordination of social security systems.²

2. The latter is a transitional provision which is intended to govern situations in which, as a consequence of the entry into force of Regulation No 883/2004 on 1 May 2010, a person is subject to the legislation of a Member State other than that to whose legislation he or she was subject under former Regulation (EEC) No 1408/71,³ repealed and replaced by Regulation No 883/2004.

3. The request for a preliminary ruling made by the referring court seeks, in essence, to ascertain whether Article 87(8) of Regulation No 883/2004 applies in a case such as that pending before it which concerns a person, Mr V, who at the time of the entry into force of Regulation No 883/2004 was employed in one Member State and self-employed in another Member State and was therefore subject to dual affiliation. It is the first time that the Court has been called upon to interpret that transitional provision of Regulation No 883/2004.

¹ Original language: French.

² 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), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43) ('Regulation No 883/2004').

³ 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 last amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71').

I. Legal framework

4. Article 13(1) of Regulation No 1408/71 codified the principle that the legislation of a single Member State is to apply and provided that ‘subject to [Article 14c] persons to whom this Regulation applies shall be subject to the legislation of a single Member State only’.

5. However, as a derogation from that principle, Article 14c(b) of Regulation No 1408/71, read in conjunction with point 1 of Annex VII to the same regulation, provided that a person who was self-employed in Belgium and employed in another Member State was to be subject to two different legislations simultaneously, namely that of the place in which he was employed and that of the place in which he was self-employed.

6. Article 11(1) of Regulation No 883/2004 confirmed the principle that the legislation of a single Member State is to apply and repealed all the exceptions to that principle provided for in Regulation No 1408/71.

7. Under Article 13(3) of Regulation No 883/2004 ‘a person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed person’.

8. Article 87(8) of Regulation No 883/2004, headed ‘Transitional provisions’, provides:

‘If, as a result of this Regulation, a person is subject to the legislation of a Member State other than that determined in accordance with Title II of Regulation [No 1408/71], that legislation shall continue to apply while the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation. The request shall be submitted within 3 months after the date of application of this Regulation to the competent institution of the Member State whose legislation is applicable under this Regulation if the person concerned is to be subject to the legislation of that Member State as of the date of application of this Regulation. If the request is made after the time indicated, the change of applicable legislation shall take place on the first day of the following month.’

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

9. Mr V worked in Belgium as a lawyer until 30 September 2007. As such, he was registered with the Institut national d’assurances sociales pour travailleurs indépendants (National Social Security Institute for Self-Employed Persons) (‘Inasti’) and was affiliated to the social security fund Securex Integrity ASBL (‘Securex’).

10. At the time of the liquidation of the law firm for which he worked, on 30 September 2007, Mr V was appointed as one of the liquidators of that firm and, at the same time, terminated his affiliation to Securex. On the following day, 1 October 2007, he began working in a company established in Luxembourg and, consequently, has been subject to the Luxembourg social security scheme as an employed person from that date.

11. In 2010, Inasti asked Mr V for detailed information about his duties as liquidator. Mr V replied that the emoluments which had been paid to him as liquidator did not make him a self-employed person or subject to the social security scheme for such workers.

12. In 2013, Inasti served on Securex a regularisation decision relating to the income received by Mr V as liquidator for the years 2008, 2009 and 2010. On that basis, Securex informed Mr V that he was to be reclassified as subject to pay contributions on a supplementary basis from 1 October 2007, and that, therefore, he had to pay more than EUR 35 000 in respect of social security contributions and increases for the period 2007-2013.

13. Mr V challenged that letter before the tribunal du travail d'Arlon (Labour Court, Arlon, Belgium). At the same time, he expressed to Securex his desire no longer to be covered by the supplementary social security scheme from 2014 and provided evidence that his duties as co-liquidator had been performed free of charge since 1 January 2010.

14. After the tribunal du travail d'Arlon (Labour Court, Arlon) dismissed his application, Mr V brought an appeal before the referring court against the judgment at first instance, in which he claimed, *inter alia*, that, in the light of Regulation No 883/2004, Inasti and Securex could not claim the contributions at issue.

15. The referring court is uncertain whether in a situation such as that of Mr V — in which, moreover, the decision concerning his liability under the Belgian supplementary social security scheme was taken retroactively in December 2013 — he was required, in order to qualify for the application of Regulation No 883/2004, to submit a specific request within 3 months under Article 87(8) of Regulation No 883/2004.

16. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) 'Is Article 87(8) of [Regulation No 883/2004] to be interpreted as meaning that a person who, before 1 May 2010, began to pursue an activity as an employed person in Luxembourg and an activity as a self-employed person in Belgium must, in order to be subject to the legislation applicable pursuant to [Regulation No 883/2004], submit an explicit request to that effect, even if he was subject to no obligation to pay contributions in Belgium before 1 May 2010 and was made subject to the Belgian legislation on the social security scheme for self-employed persons only retroactively, following the expiry of the three-month period starting on 1 May 2010?'
- (2) If the first question is answered in the affirmative: does the request referred to in Article 87(8) of [Regulation No 883/2004] and submitted in the circumstances described above entail the application of the legislation of the competent State pursuant to [Regulation No 883/2004] with retroactive effect from 1 May 2010?'

III. Legal assessment

17. It should be noted at the outset that, following a request for clarification sent to the referring court by the Court of Justice pursuant to Article 101 of the Rules of Procedure, the referring court stated that, at the time of the entry into force of Regulation No 883/2004, Mr V could be regarded as being subject to Belgian legislation as a self-employed person, in respect of his activity as a liquidator for the law firm in liquidation.

18. It is therefore necessary to analyse the questions referred to the Court in the light of that premise.⁴

⁴ On the other hand, the fact that the decision concerning his liability under the Belgian supplementary social security scheme was taken retroactively is not, in my view, relevant to the analysis of the provisions of Regulation No 883/2004. The objective of that regulation is not to lay down the substantive conditions giving rise to the right to social security benefits and it is, in principle, for the legislation of each Member State to lay down those conditions (see, to that effect, judgments of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraph 41 and the case-law cited) and of 14 June 2016, *Commission v United Kingdom* (C-308/14, EU:C:2016:436, paragraph 65)).

19. That said, the questions referred raise, in essence, the issue of whether Article 87(8) of Regulation No 883/2004 is applicable in a case such as that of Mr V.

20. The first question seeks to determine whether that provision is to be interpreted as meaning that a person who, at the time of the entry into force of Regulation No 883/2004, that is 1 May 2010, on the one hand, was employed in one Member State (in this case, Luxembourg) and therefore subject to the legislation of that Member State and, on the other hand, was self-employed in Belgium and therefore subject to Belgian legislation as a self-employed person must, in order to be subject to the legislation applicable under Regulation No 883/2004, submit an express request to that effect pursuant to Article 87(8) of that regulation.

21. If the answer is in the affirmative, the second question seeks to determine whether such a request made in specific circumstances such as those of the present case entails the application of the legislation applicable under Regulation No 883/2004 with retroactive effect from 1 May 2010.

22. First of all, the plea of inadmissibility raised by the Kingdom of Belgium should be rejected. It maintains that the two questions referred do not reflect the actual facts or the purpose of the dispute and therefore raise a problem which is purely hypothetical.

23. In that regard, it should be pointed out that, according to the case-law, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court of Justice is bound, in principle, to give a ruling unless it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.⁵

24. As regards, in the first place, the Belgian Government's argument that the two questions referred for a preliminary ruling are based on the incorrect factual premise that Mr V was not liable for any tax in Belgium before 1 May 2010, it has become irrelevant following the reply of the national court to the request for clarification referred to in point 17 of this Opinion.

25. In the second place, and in any event, it is apparent from the file before the Court that the question of whether or not, in order to be able to be subject exclusively to the legislation determined under Regulation No 883/2004, namely Luxembourg legislation, after 1 May 2010, Mr V was required to submit a request pursuant to Article 87(8) of that regulation, and the question, if so, of the consequences of submitting such a request several years after that date, have a certain impact on the outcome of the dispute pending before the referring court. The reply to those questions has a direct impact on the number of years for which the Belgian authorities would be entitled to claim any contributions payable from Mr V.

26. It follows that the questions referred by the national court are not hypothetical and are therefore admissible.

27. As to the substance, it is apparent from the file that, at the time of the entry into force of Regulation No 883/2004, Mr V, due to the derogation from the principle that the legislation of a single Member State is to apply, laid down in Article 14c(b) of Regulation No 1408/71, in conjunction with point 1 of Annex VII to that regulation, was subject to two sets of legislation: the Luxembourg legislation, as an employed person, and Belgian law, as a self-employed person.

⁵ See judgment of 7 December 2010, *VEBIC* (C-439/08, EU:C:2010:739, paragraph 42 and the case-law cited).

28. The first question referred seeks to ascertain, in the light of Article 87(8) of Regulation No 883/2004, what consequences the entry into force of that regulation had on that situation.

29. In those circumstances, I take the view that it is necessary to interpret that provision in order to establish its applicability to a situation such as that of Mr V. If that transitional provision was applicable, then Mr V, in order to be subject exclusively to the law as determined pursuant to Regulation No 883/2004, should have submitted the request provided for therein. On the other hand, if that provision was not applicable, then, in view of the repeal of the derogation laid down for Belgium in Regulation No 1408/71 and in accordance with the principle that the legislation of a single Member State is to apply, which became absolute under Regulation No 883/2004, Mr V would have been subject exclusively to the legislation as determined on the basis of the latter regulation, namely Luxembourg legislation.

30. According to the settled case-law of the Court, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision, but also its context and the objectives pursued by the rules of which it is part.⁶

31. As regards, first of all, the wording of Article 87(8) of Regulation No 883/2004, it is apparent that that transitional provision applies where, by virtue of the entry into force of Regulation No 883/2004, a person was subject to the legislation of a Member State other than that to whose legislation he was subject under Regulation No 1408/71.

32. The wording of that provision therefore shows that it applies to cases in which a person moves from a situation in which he is subject to the legislation of one Member State to a situation in which he is subject to the legislation of another Member State.

33. As the European Commission rightly points out, that provision does not, however, expressly cover situations, like those based on Article 14c(b) of Regulation No 1408/71, in which the social security legislations of two Member States were simultaneously applicable and after the entry into force of Regulation No 883/2004, only one of those two legislations remains applicable.

34. The non-applicability of Article 87(8) of Regulation No 883/2004 to a situation such as that at issue before the referring court is, in my view, also confirmed by the context of that provision and by the objectives pursued by the legislation at issue.

35. Further, as regards the context, it should be noted that Regulation No 883/2004 removed all the exceptions to the principle that the legislation of a single Member State is to apply which existed when Regulation No 1408/71 was in force. However, an interpretation of Article 87(8) of Regulation No 883/2004, which, going beyond its wording, extends the derogation by providing for dual affiliation would, in my view, be inconsistent with the system established by Regulation No 883/2004, based on the principle, which is now absolute, that the legislation of a single Member State is to apply.

36. Similarly, the purpose of Article 87(8) of Regulation No 883/2004 has been defined as being to prevent many changes of applicable legislation on the changeover to the new regulation and to enable the person concerned to have a smooth transition with regard to the legislation applicable if there is a discrepancy between the legislation applicable under Regulation No 1408/71 and the legislation applicable under the provisions of Regulation No 883/2004.⁷

⁶ See, inter alia, judgment of 21 March 2018, *Klein Schiphorst* (C-551/16, EU:C:2018:200, paragraph 34).

⁷ See the Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland prepared and agreed by the Administrative Commission for the Coordination of Social Security Systems (ec.europa.eu/social/BlobServlet?docId=11366&langId=en, page 50).

37. In those circumstances, as the Commission has pointed out, the removal in Regulation No 883/2004 of the possibility of dual affiliation, which existed in Regulation No 1408/71, militates against the idea that Article 87(8) of Regulation No 883/2004 can have been intended to perpetuate such a possibility which, moreover, is removed in that regulation.

38. It follows from all the foregoing that, in my view, Article 87(8) of Regulation No 883/2004 is not applicable to a situation such as that of Mr V who, at the time of the entry into force of that regulation, was subject, under Article 14c(b) of Regulation No 1408/71, to the legislation of two different Member States simultaneously.

39. In my view this conclusion renders it unnecessary to address the arguments put forward by the Belgian Government with regard to the interpretation of the condition, laid down in Article 87(8) of Regulation No 883/2004, according to which, for the legislation determined under Regulation No 1408/71 to continue to apply, ‘the relevant situation’ must remain unchanged. Indeed, the interpretation of that condition becomes relevant only if the provision in Article 87(8) is applicable, which, in my view, in the light of the foregoing considerations, is not the case here.

40. It follows that in order to be subject, from 1 May 2010, exclusively to the law as determined by Regulation No 883/2004 — namely, under Article 13(3) of that regulation, Luxembourg law — Mr V was not required to submit the request provided for in Article 87(8) of Regulation No 883/2004.

41. In view of the solution which I propose to the Court, there is no need to answer the second question referred by the national court.

IV. Conclusion

42. In the light of the foregoing, I propose that the Court answer the questions referred by the *cour du travail de Liège* (Higher Labour Court, Liège) (Belgium) as follows:

Article 87(8) 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 must be interpreted as meaning that it does not apply to a person who, at the time of the entry into force of that regulation — that is 1 May 2010 — was subject to dual affiliation under Article 14c(b) 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. In order to be subject to the legislation applicable under Regulation No 883/2004, such a person was not therefore required to submit a specific request to that effect under that provision.