Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

9 September 2015*

(References for a preliminary ruling — Migrant workers — Social security — Applicable legislation — Rhine boatmen — E 101 certificate — Probative value — Reference to the Court — Obligation to make a reference for a preliminary ruling)

In Joined Cases C-72/14 and C-197/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Gerechtshof te 's-Hertogenbosch and the Hoge Raad der Nederlanden (Netherlands), made by decisions of 7 February and 28 March 2014, received at the Court on 10 February and 18 April 2014 respectively, in the proceedings

X

v

Inspecteur van Rijksbelastingdienst (C-72/14),

and

T. A. van Dijk

v

Staatssecretaris van Financiën (C-197/14),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.-C. Bonichot, A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— X and Mr van Dijk, by M.J. van Dam, advocaat,

* Language of the case: Dutch.

— the Netherlands Government, by M. Bulterman, M. de Ree and H. Stergiou and by J. Langer, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the Greek Government, by E.-M. Mamouna, M. Tassopoulou and A. Samoni-Rantou, acting as Agents,

— the European Commission, by D. Martin and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 May 2015

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 7(2)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, and of Articles 10c to 11a, 12a and 12b of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71, 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' and 'Regulation No 574/72' respectively), and the interpretation of the third paragraph of Article 267 TFEU.

2 The requests have been made in proceedings between, in the first case, X and the Inspecteur van Rijksbelastingdienst (Inspector, National Tax Office) and, in the second case, Mr van Dijk and the Staatssecretaris van Financiën (State Secretary for Finance), concerning tax assessments issued in respect of them.

Legal context

International law

3 The Agreement concerning the social security of Rhine boatmen, adopted by the Intergovernmental Conference charged with amending the Agreement of 13 February 1961 concerning the Social Security of Rhine Boatmen, signed at Geneva on 30 November 1979 ('the Rhine Agreement') provides in Article 2(1):

'Subject to Article 9(2) and Article 54, the present Agreement shall apply, on the territory of the Contracting Parties, to all persons who are or have been subject, in their capacity as Rhine boatmen, to the legislation of one or more of the Contracting Parties, and to the members of their family and to their survivors.'

EU law

Regulation No 1408/71

4 Article 6 of Regulation No 1408/71 provides that that regulation replaces any social security convention binding Member States exclusively or at least two Member States and one or more other States.

5 Under the heading 'International provisions not affected by this Regulation', Article 7(2)(a) of Regulation No 1408/71 provides that the provisions of the Rhine Agreement remain applicable notwithstanding the provisions of Article 6.

6 Title II of Regulation No 1408/71, which comprises Articles 13 to 17a, contains rules determining the legislation applicable in the area of social security.

Regulation No 574/72

7 Under the heading 'Implementation of the provisions of the regulation for determining the legislation applicable', Title III of Regulation No 574/72 lays down the detailed rules for the application of Articles 13 to 17 of Regulation No 1408/71.

8 In particular, Articles 10c to 11a, 12a and 12b of Regulation No 574/72 provide that the institution designated by the competent authority of the Member State whose legislation is to remain applicable under Articles 13(2)(d), 14(1)(a) and 2(a) and (b), 14a(1)(a), (2) and (4), 14b(1), (2) and (4), 14c(a), 14e and 17 of Regulation No 1408/71 is to issue a certificate — the E 101 certificate — stating that the worker concerned is subject to the legislation of that Member State.

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

Case C-72/14

9 X is a Netherlands national and in 2006 resided in the Netherlands and worked as a helmsman on a motor vessel which was registered in the Netherlands.

10 In 2006, the vessel operated commercially not only on the Rhine, but mostly on other inland waterways.

11 Also in 2006, X was on the payroll of a Luxembourg-based company.

12 On 25 November 2004, the Ministry of Transport and Water Management (Ministerie van Verkeer en Waterstaat) issued a document certifying that the vessel belongs to Rhine Navigation (Rijnvaartverklaring), as referred to in Article 1(h) and Article 5(1) of the Law on Inland Waterway Transport (Wet vervoer binnenvaart), to the owner of the vessel, a company based in Rotterdam (Netherlands).

13 X applied to the competent authority of the Grand Duchy of Luxembourg to be affiliated to the Luxembourg social security scheme, which request was granted. On 1 March 2006 the Luxembourg authority, 'Union des caisses de maladie à Luxembourg', issued an E 101 certificate in respect of X for his work.

14 X submitted a return for income tax and social security contributions for the year 2006 on a taxable income from work of EUR 31 647. In his return X applied for an exemption from social security contributions and a reduction in order to avoid double taxation. In the assessment, the national tax authority inspector granted neither the exemption nor the reduction requested. In addition, a correction was applied to the calculation of the tax.

15 A tax assessment was issued to X in respect of income tax and social security contributions owing for the year 2006, on the basis of a taxable work income of EUR 28 914 euros.

16 X lodged an objection against inter alia the refusal to grant the exemption from social security contributions to the year in question. The national tax authority inspector rejected that objection as unfounded.

17 X brought proceedings against the decision rejecting his claim before the Rechtbank Breda (District Court, Breda), which held it to be unfounded. X then appealed against the judgment of the Rechtbank Breda before the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch (Netherlands)).

18 The Gerechtshof te 's-Hertogenbosch considers that the Rechtbank Breda was correct in holding that X must be considered a Rhine boatman within the meaning of the Rhine Agreement and that, therefore, the designation rules contained in that agreement are applicable to him. Thus, the Gerechtshof te 's-Hertogenbosch seeks clarification as to the potential scope of the E 101 certificate issued on 1 March 2006 by the Luxembourg institution competent for issuing that type of certificate.

19 In those circumstances the Gerechtshof te 's-Hertogenbosch decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) In the judgment in *FTS* (C-202/97, EU:C:2000:75), the Court of Justice ruled that an E 101 certificate, issued by the competent institution of a Member State, is binding on the social security institutions of other Member States, even if the content of that certificate is incorrect. Does that decision also apply to cases such as that at issue here, where the designation rules of the Regulation do not apply?

(2) Is it significant for the answer to that question that it was not the intention of the competent institution to issue an E 101 certificate, yet for administrative reasons it consciously and deliberately used documents which, judging by their format and content, appear to be E 101 certificates, while the interested party believed, and was also reasonably entitled to believe, that he had received such a certificate?'

Case C-197/14

20 From 1 January to 30 June 2007 M van Dijk, who was at that time resident in the Netherlands, was employed by Christa Intershipping Sarl, a company established in Luxembourg. During that period he worked within the territory of a number of Member States as a captain on an inland waterway vessel, primarily on the Rhine, its tributaries and its links to the open sea.

21 The Luxembourg authorities issued an E 101 certificate to Mr van Dijk which stated that the Luxembourg social security legislation is applicable to him as from 1 September 2004, pursuant to Regulation No 1408/71.

22 Mr van Dijk was served with an income tax assessment for the year 2007 in respect of social security contributions and a tax assessment for health care insurance contributions for the same year, calculated on the basis of his income. Mr van Dijk challenged those tax assessments but they were upheld by the Netherlands tax authorities.

23 After he brought proceedings against the decisions rejecting his claim before the District Court, The Hague (Rechtbank te 's-Gravenhage) and the latter had upheld the tax assessments in question, Mr van Dijk appealed before the Gerechtshof te 's-Gravenhage.

24 The Gerechtshof te 's -Gravenhage upheld the judgment of the Rechtbank te 's-Gravenhage. In particular, the Gerechtshof te 's-Gravenhage held that Mr van Dijk had to be considered a Rhine boatman within the meaning of the Rhine Agreement and that, on the basis of Article 11(2) of that agreement, the Netherlands social security scheme was applicable to him. The Gerechtshof te 's-Gravenhage further held no legal value could be attributed to the E 101 certificate in question, since it had been issued on the basis of Regulation No 1408/71, which was not applicable to Mr van Dijk, in accordance with Article 7(2)(a) thereof.

25 Mr van Dijk appealed in cassation against the judgment of the Gerechtshof te 's-Gravenhage before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

26 It is apparent from the order for reference that the Hoge Raad der Nederlanden has previously had the opportunity to rule on the scope of the E 101 certificate in a case similar to the one at issue in the main proceedings.

27 In its judgment of 11 October 2013 (No 12/04012, ECLI:NL:HR:2013:CA0827), the Hoge Raad der Nederlanden held that no value could be attributed to the issuance of an E 101 certificate and that the principle of sincere cooperation had not been infringed, since Mr van Dijk had to be considered a Rhine boatman within the meaning of Article 1(m) of the Rhine Agreement and was, accordingly, subject to that agreement and not Regulation No 1408/71.

28 The Hoge Raad took this decision without referring any questions to the Court of Justice for preliminary ruling as it was of the view that the matter could not be open to any reasonable doubt.

29 By contrast, by decision of 7 February 2014 (No 13/00040, ECLI:NL:GHSHE:2014:248, V-N 2014/12.15), the Gerechtshof te 's-Hertogenbosch referred two questions to the Court for a preliminary ruling; they are the subject-matter of Case C-72/14.

30 Thus, since the answer to those questions may be relevant for the outcome of the dispute before it, the Hoge Raad der Nederlanden seeks to know whether it may, in accordance with its judgment of 11 October 2013, rule on that dispute without referring questions to the Court of Justice for a preliminary ruling and without awaiting the answers to the questions referred for a preliminary ruling by the Gerechtshof te 's-Hertogenbosch.

31 In particular, the Hoge Raad der Nederlanden asks whether, since it takes the view that the answer to the question of interpretation of EU law raised before it is so obvious as to leave no scope for any reasonable doubt, the conditions set out in paragraph 16 of the judgment in *Cilfit and Others* (283/81, EU:C:1982:335) may still be regarded as being met.

32 It is on that basis that the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the Hoge Raad der Nederlanden, as the highest national court, required, because of a question referred for a preliminary ruling by a lower national court, to refer a question to the Court of Justice for a preliminary ruling or must it await the answer to that question referred by the lower

national court, even if it takes the view that the correct application of EU law on the matter to be decided by it is so obvious as to leave no scope for any reasonable doubt as to how that question must be answered?

(2) If the first question is to be answered in the affirmative, are the Netherlands authorities in the area of social security then bound by an E 101 certificate issued by the authorities of another Member State, even where the case involves a Rhine boatman, with the result that the rules on the applicable legislation in Regulation No 1408/71, to which that certificate refers, are not applicable pursuant to Article 7(2)(a) of that regulation?'

33 By decision of the President of the Court of 24 February 2015, Cases C-72/14 and C-197/14 were joined for the purposes of the oral procedure and the judgment.

Consideration of the questions referred

Preliminary remarks

34 It is apparent from the orders for reference that the applicants in the main proceedings are Rhine boatmen, who were each issued an E 101 certificate by the institution competent to issue that type of certificate in Luxembourg.

35 It is also apparent from the order for reference in Case C-72/14 that that institution considered that, under the designation rules referred to in the Rhine Agreement, the applicant in the main proceedings was subject to Luxembourg legislation and that, since no form equivalent to the E 101 certificate was provided for in that agreement, that institution used the E 101 certificate in order to certify that the applicant in the main proceedings was affiliated to the Luxembourg social security scheme.

36 It is on the basis of those premises that the questions put by the referring courts must be answered. There will be no appraisal in the present judgment as to the classification of the applicants in the main proceedings as Rhine boatmen or as to which national legislation is applicable to them.

Consideration of the questions in Case C-72/14 and the second question in Case C-197/14

37 By the questions in Case C-72/14 and by the second question in Case C-197/14, which should be examined together, the referring courts ask, in essence, whether Article 7(2)(a) of Regulation No 1408/71 and Articles 10c to 11a, 12a and 12b of Regulation No 574/72 must be interpreted as meaning that a certificate issued by the competent institution of a Member State in the form of an E 101 certificate in order to certify that a worker is subject to the social security legislation of that Member State, when that worker comes within the scope of the Rhine Agreement, is binding on the institutions of the other Member States and whether the fact that the issuing institution did not intend to issue a genuine E 101 certificate but used the standard form of that certificate for administrative reasons is relevant in that regard.

38 First of all, it must be borne in mind that the E 101 certificate corresponds to a standard form, issued in accordance with Title III of Regulation No 574/72, by the institution designated by the competent authority of the Member State whose social security legislation is applicable, in order to certify that migrant workers finding themselves in one of the situations referred to in certain provisions of Title II of Regulation No 1408/71 are subject to the legislation of that Member State, as referred to in paragraphs 7 and 8 of this judgment.

39 It thus appears that the use of the E 101 certificate is relevant only in the event of application of the rules for determining the social security legislation applicable to the workers concerned, as laid down in Title II of Regulation No 1408/71. This view is supported by the references in the standard form, which do not cover situations other than those relating to workers coming within the scope of Title II.

40 Moreover, the Court has held that in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking which posted those workers is established, such a certificate is binding on the competent institution of the Member State to which those workers are posted (judgment in *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 24).

41 The Court has also held that, as long as it has not been withdrawn or declared invalid by the authorities of the Member State which issued it, an E 101 certificate binds the competent institution and the courts of the Member State in which the workers are posted (judgment in *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 33).

42 Moreover, since the E 101 certificate is binding on that competent institution, there can be no justification for the person who calls on that worker's services not to act upon that certificate. If he has doubts as to the validity of the certificate, that person must however inform the institution in question (judgment in *Banks and Others*, C-178/97, EU:C:2000:169, paragraph 47).

43 It should nevertheless be emphasised that the case-law referred to in paragraphs 40 to 42 of this judgment is intended to cover situations where the E 101 certificates were issued in respect of workers coming under Title II of Regulation No 1408/71.

44 The E 101 certificates at issue in the main proceedings in the cases at hand, however, were issued in respect of Rhine boatmen, as observed in paragraph 34 of this judgment.

45 It should be borne in mind in that regard that Article 7(2)(a) of Regulation No 1408/71 provides that, the provisions of Article 6 — which provides that that regulation replaces any social security convention binding Member States exclusively or at least two Member States and one or more other States — notwithstanding, the provisions of the Rhine Agreement concerning their social security remain applicable.

46 It follows that Rhine boatmen do not come within the scope of Regulation No 1408/71, but rather the Rhine Agreement, with the result that the question of which social security legislation is applicable to them must be determined not as provided for under Title II of that regulation but in accordance with that agreement.

47 In those circumstances, a certificate issued by an institution of a Member State confirming that a worker classified as a Rhine boatman is subject to the legislation of that Member State, such as the certificates at issue in the main proceedings, cannot be regarded as being an E 101 certificate, even though it may come in the same form and irrespective of whether it was issued by the institution designated by the competent authority of a Member State within the meaning of Regulation No 1408/71 for issuing that type of certificate.

48 Consequently, such a certificate cannot produce the effects of an E 101 certificate, including binding effect for institutions of the Member States other than the one of the institution which issued the certificate.

49 In that context, the fact that the issuing institution did not intend to issue an E 101 certificate but used a reference standard form for administrative reasons is irrelevant in the present case for the purpose of answering the questions referred.

50 In any event, the fact that a certificate concerning a Rhine boatman issued in the form of an E 101 certificate, such as the ones at issue in the main proceedings, does not produce the effects arising from an E 101 certificate, does not necessarily mean that the certificate has no legal effect whatsoever.

51 In the light of the foregoing considerations, the answer to the questions in Case C-72/14 and the second question in Case C-197/14 is that Article 7(2)(a) of Regulation No 1408/71 and Articles 10c to 11a, 12a and 12b of Regulation No 574/72 must be interpreted as meaning that a certificate issued by the competent institution of a Member State in the form of an E 101 certificate in order to certify that a worker is subject to the social security legislation of that Member State, when that worker comes within the scope of the Rhine Agreement, is not binding on the institutions of other Member States. The fact that the issuing institution did not intend to issue a genuine E 101 certificate but used the standard form of that certificate for administrative reasons is irrelevant in that regard.

Consideration of the first question in Case C-197/14

52 By its first question in Case C-197/14, the referring court asks, in essence, whether the third paragraph of Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the referring court, is required to make a reference to the Court of Justice when a lower national court, in a case similar to the one before it concerning exactly the same legal issue, has made a reference to the Court, or whether it is required to wait until an answer has been given to that question.

53 Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the Union and the validity of those acts. The second paragraph of that article provides that a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of that article provides that the national court or tribunal is bound to make a reference if there is no judicial remedy under national law against its decisions (judgment in *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 40).

54 It should be remembered, in particular, that the obligation on national courts and tribunals against whose decision there is no judicial remedy to refer a matter to the Court of Justice under the third paragraph of Article 267 TFEU is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court (judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 7).

55 The Court has held that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the EU law provision in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The Court has further held that the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular to which its interpretation gives rise and the risk of divergences in judicial decisions within the EU (judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21).

56 In the present case, as a national court lower than the referring court has referred a question of EU law to the Court which is similar to the one raised before the referring court and concerning exactly the same legal issue, the question arises as to whether that situation precludes the criteria laid down in

the judgment in *Cilfit and Others* (283/81, EU:C:1982:335) for establishing the presence of an 'acte clair' — in particular the criterion of the correct application of EU law being so obvious as to leave no scope for any reasonable doubt — from being met.

57 It must be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment in *Eon Aset Menidjmunt*, C-118/11, EU:C:2012:97, paragraph 76).

58 Moreover, the case-law as stated in *Cilfit and Others* (283/81, EU:C:1982:335) gives the national court sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court of Justice a question concerning the interpretation of EU law which has been raised before it (judgment in *Intermodal Transports*, C-495/03, EU:C:2005:552, paragraph 37 and the case-law cited) and take upon itself the responsibility for resolving it (judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 16).

59 It follows therefrom that it is for the national courts alone against whose decisions there is no judicial remedy under national law, to take upon themselves independently the responsibility for determining whether the case before them involves an 'acte clair'.

60 Thus, although in a situation such as that at issue in the main proceedings a supreme court of a Member State must bear in mind in its assessment that a case is pending in which a lower court has referred a question to the Court of Justice for a preliminary ruling, that fact alone does not preclude the supreme court of a Member State from concluding, from its examination of the case and in keeping with the criteria laid down in the judgment in *Cilfit and Others* (283/81, EU:C:1982:335), that the case before it involves an 'acte clair'.

61 Lastly, since the fact that a lower court has made a reference to the Court for a preliminary ruling on the same legal issue as that raised before the national court ruling at final instance does not in and of itself preclude the criteria laid down in the judgment in *Cilfit and Others* (283/81, EU:C:1982:335) from being met, with the result that the latter court might decide to refrain from making a reference to the Court and resolve the question raised before it on its own, nor is the supreme national court required to wait until the Court of Justice has given an answer to the question referred for a preliminary ruling by the lower court.

62 This conclusion is moreover confirmed by the Court's case-law, according to which Article 267 TFEU does not preclude decisions of courts or tribunals against whose decisions there is a judicial remedy under national law and who have referred a matter to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law, which allows the higher court to adjudicate the dispute which was the subject-matter of the reference, thereby assuming responsibility for ensuring compliance with EU law (see, to that effect, order in *Nationale Loterij*, C-525/06, EU:C:2009:179, paragraphs 6 to 8).

63 In the light of the foregoing considerations, the answer to the first question in Case C-197/14 is that the third paragraph of Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the referring court, is not required to make a reference to the Court of Justice on the sole ground that a lower national court, in a case similar to the one before it and involving the same legal issue, has referred a question to the Court for a preliminary ruling; nor is it required to wait until an answer to that question has been given.

Costs

64 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:

1. **Article 7(2)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, and Articles 10c to 11a, 12a and 12b of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as meaning that a certificate issued by the competent institution of a Member State in the form of an E 101 certificate in order to certify that a worker is subject to the social security legislation of that Member State, when that worker comes within the scope of the Agreement of 13 February 1961 concerning the Social Security of Rhine Boatmen, signed at Geneva on 30 November 1979, is not binding on the institutions of other Member States. The fact that the issuing institution did not intend to issue a genuine E 101 certificate but used the standard form of that certificate for administrative reasons is irrelevant in that regard.**

2. **The third paragraph of Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the referring court, is not required to make a reference to the Court of Justice of the European Union on the sole ground that a lower national court, in a case similar to the one before it and involving the same legal issue, has referred a question to the Court for a preliminary ruling; nor is it required to wait until an answer to that question has been given.**

[Signatures]