

62013CJ0266

JUDGMENT OF THE COURT (Fifth Chamber)

19 March 2015 (*1)

?Reference for a preliminary ruling — Social security — Regulation (EEC) No 1408/71 — Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons — National of a Member State, in which he resides, employed on a pipe-laying vessel flying the flag of another third State — Person initially employed by an undertaking established in the Netherlands and subsequently by an undertaking established in Switzerland — Work performed, in succession, on the continental shelf adjacent to a third State, in international waters and in the part of the continental shelf adjacent to certain Member States — Scope *ratione personae* of Regulation No 1408/71 — Determination of the legislation applicable'

In Case C-266/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 12 April 2013, received at the Court on 15 May 2013, in the proceedings

L. Kik

v

Staatssecretaris van Financiën,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 July 2014,

after considering the observations submitted on behalf of:

—

Mr Kik, by H. Menger,

—

the Netherlands Government, by B. Koopman, M. Bulterman, C. Schillemans and M. Gijzen, acting as Agents,

—

the European Commission, by M. van Beek and J. Enegren, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 16 October 2014,
gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Regulation (EEC) No 1408/71 of the Council 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 the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1) ('Regulation No 1408/71').

2

The request has been made in proceedings between Mr Kik and the Staatssecretaris van Financiën (State Secretary for Finance) concerning Mr Kik's insurance under the Netherlands social security scheme for the period from 1 June 2004 to 24 August 2004.

Legal context

International law

3

The United Nations Convention on the Law of the Sea, signed in Montego Bay (Jamaica) on 10 December 1982, which entered into force on 16 November 1994, was ratified by the Kingdom of the Netherlands on 28 June 1996 and by the United Kingdom of Great Britain and Northern Ireland on 25 July 1997 and was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (JO 1998 L 179, p. 1, 'the Convention on the Law of the Sea').

4

Article 60 of the Convention on the Law of the Sea, which is entitled 'Artificial islands, installations and structures in the exclusive economic zone', reads as follows:

'1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorise and regulate the construction, operation and use of:

(a)

artificial islands;

(b)

installations and structures for the purposes provided for in Article 56 and other economic purposes;

(c)

installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

...'

5

Article 77 of the Convention on the Law of the Sea, entitled 'Rights of the coastal State over the continental shelf', provides:

'1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

...'

6

Article 79 of that convention, entitled 'Submarine cables and pipelines on the continental shelf', is worded as follows:

'1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this Article.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.

4. Nothing in this part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.

...'

7

Article 80 of the Convention on the Law of the Sea, entitled 'Artificial islands, installations and structures on the continental shelf', provides that Article 60 of the convention is to apply mutatis mutandis to artificial islands, installations and structures on the continental shelf.

Regulation No 1408/71 cites as a legal basis, inter alia, Article 51 of the EEC Treaty (subsequently Article 51 of the EC Treaty and, following amendment, Article 42 EC), to which Article 48 TFEU now corresponds. Those Articles concern principally the coordination of the social security schemes of the Member States and the payment of benefits under those coordinated schemes. After that citation, the preamble to Regulation No 1408/71 contains, amongst others, the following recitals:

‘Whereas the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should contribute towards the improvement of their standard of living and conditions of employment;

...

Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all persons insured under social security schemes for employed persons and for self-employed persons or by virtue of pursuing employment or self-employment;

Whereas it is necessary to respect the special characteristics of national social security legislations and to draw up only a system of coordination;

...

Whereas employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom;

...

Whereas with a view to guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment [or] self-employment;

Whereas in certain situations which justify other criteria of applicability, it is possible to derogate from this general rule;

...’

Article 1 of Regulation No 1408/71 provides:

‘For the purpose of this Regulation:

(a)

employed person and self-employed person mean respectively:

(i)

any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;

...

10

Under the title 'Persons covered', Article 2 of Regulation No 1408/71 provides in paragraph 1:

'This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

11

Title II of Regulation No 1408/71 comprises Articles 13 to 17a, which relate to the determination of the legislation applicable. Article 13, after laying down in paragraph 1 the rule that persons to whom the regulation applies are to be subject to the legislation of a single Member State only, continues as follows:

'2. Subject to Articles 14 to 17:

(a)

a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...

(c)

a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of the State;

...

(f)

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 in accordance with the provisions of that legislation alone.'

12

Article 14 of Regulation No 1408/71, which is entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', makes the following provision:

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

...

2.

A person normally employed in the territory of two or more Member States shall be subject to the legislation determined as follows:

(a)

A person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State shall be subject to the legislation of the latter State, with the following restrictions:

(i)

where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a person employed by such branch or permanent representation shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;

(ii)

where a person is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory.

(b)

A person other than that referred to in (a) shall be subject:

(i)

to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;

(ii)

to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity.

...'

Article 14b of Regulation No 1408/71, which lays down special rules applicable to mariners, provides:

‘Article 13(2)(c) shall apply subject to the following exceptions and circumstances:

...

4.

A person employed on board a vessel flying the flag of a Member State and remunerated for such employment by an undertaking or a person whose registered office or place of business is in the territory of another Member State shall be subject to the legislation of the latter State if he is resident in the territory of that State; the undertaking or person paying the remuneration shall be considered as the employer for the purpose of the said legislation.’

14

In accordance with Article 15 of Regulation No 1408/71, which is entitled ‘Rules concerning voluntary insurance or optional continued insurance’:

‘1. Articles 13 to 14d shall not apply to voluntary insurance or to optional continued insurance unless, in respect of one of the branches referred to in Article 4, there exists in any Member State only a voluntary scheme of insurance.

2. Where application of the legislations of two or more Member States entails overlapping of insurance:

—

under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned shall be subject exclusively to the compulsory insurance scheme;

...’

15

The Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002, on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1) (the ‘EC-Switzerland Agreement’) makes the following provision in Article 8:

‘The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of:

(a)

securing equality of treatment;

(b)

determining the legislation applicable;

(c)

aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(d)

paying benefits to persons residing in the territory of the Contracting Parties;

(e)

fostering mutual administrative assistance and cooperation between authorities and institutions.'

16

Annex II to the EC-Switzerland Agreement, which concerns the coordination of social security schemes, provides in Article 1:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the Agreement and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term "Member State(s)" contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.'

17

Section A of Annex II to that agreement makes reference, inter alia, to Regulation No 1408/71.

18

Regulation No 1408/71 was replaced by 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), which became applicable on 1 May 2010, on which date Regulation No 1408/71 ceased to apply. Annex II to the EC-Switzerland Agreement was updated by Decision No 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012 replacing Annex II to that Agreement on the coordination of social security schemes (OJ 2012 L 103, p. 51), which entered into force on 1 April 2012. Annex II to the EC-Switzerland Agreement now refers to Regulation No 883/2004. However, facts that arose before the date of entry into force of that decision continue to be governed by Regulation No 1408/71 in accordance with both (i) Article 90(1) of Regulation No 883/2004, which provides that Regulation No 1408/71 is to remain in force and to continue to have legal effect for the purposes of, inter alia, the EC-Switzerland Agreement for as long as that agreement has not been amended, and (ii) point 3 of Section A of Annex II to the EC-Switzerland Agreement, as amended, which continues to refer to Regulation No 1408/71 'when cases are concerned which occurred in the past'.

19

According to the order for reference, under the Netherlands legislation concerning the social security scheme, employed persons who are resident in the Netherlands are, as a general rule, to be compulsorily insured in respect of the various branches of that scheme. By way of exception, Article 12(1) of the 1999 Decree on the extension and restriction of the category of insured persons in respect of national insurance (Besluit uitbreiding en beperking kring verzekerden volksverzekeringen 1999) provides that such insurance ceases where a person works outside the Netherlands for a continuous period of at least three months, unless that work is performed for an employer established in the Netherlands. According to the explanation provided by the Netherlands Government, the Decree on compulsory insurance for seafarers (Besluit verzekeringsplicht zeevarenden) provides, in the same vein, that, when a mariner who is resident in a Member State is employed on board a vessel flying the flag of a third State which is not a State party to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) by an employer established in the Netherlands, the Netherlands legislation on social security for employed persons is applicable.

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

20

In the course of 2004, Mr Kik, a Netherlands national residing in the Netherlands, worked on board a pipe-laying vessel that flew the Panamanian flag. He was employed until 31 May 2004 by a company established in the Netherlands and was subject to the Netherlands social security scheme. In the period from 1 June 2004, a company established in Switzerland employed Mr Kik to carry out the same activity. His salary continued to be subject to Netherlands income tax. Under the Netherlands legislation, insurance under the social security scheme ceases where a person works outside the Netherlands for a continuous period of at least three months for an employer who is not established in the Netherlands.

21

The question which is central to the dispute in the main proceedings is whether, in the light of Regulation No 1408/71, Mr Kik is liable to pay Netherlands social security contributions for the period from 1 June 2004 to 24 August 2004. During that period, the vessel on which he was working was positioned, in succession, above the continental shelf adjacent to a third State, in international waters and above the part of the continental shelf adjacent to certain Member States (the Netherlands and the United Kingdom).

22

Mr Kik submits that it follows from Regulation No 1408/71 that he was not subject to the Netherlands social security scheme during the period concerned.

23

Hearing the appeal in cassation brought by Mr Kik against the decision of the lower court finding him liable to pay contributions to the Netherlands social security scheme for the period under consideration, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) is uncertain whether Regulation No 1408/71 is applicable.

24

The Hoge Raad enquires first of all whether the regulation applies exclusively to migrant workers and, if that is the case, whether Mr Kik, in view of the succession of places in which he worked during the period at issue, may be regarded as such a worker, account being taken of the particular nature of the vessel on which he was working and its classification under the Convention on the Law of the Sea and, if relevant, of the intended use of the pipes laid.

25

In particular, the referring court is uncertain whether, during the periods when the vessel concerned was above the part of the continental shelf adjacent either to the Netherlands or to the United Kingdom, Mr Kik was to be regarded as carrying out his activity in the territory of those Member States. Depending on the answer to that question, it might have to be found that, during either the whole of the period at issue or a large part of it, Mr Kik worked outside the territory of the European Union and cannot be regarded as a migrant worker falling, on that account, within the scope *ratione personae* of Regulation No 1408/71.

26

However, the national court, referring to the judgment in *Aldewereld* (C-60/93, EU:C:1994:271), considers that, even where a professional activity is carried on outside the territory of the European Union, a sufficiently close connection with that territory will result in Title II of Regulation No 1408/71 being applied to a worker who is a national of a Member State.

27

In that regard, the referring court considers the possibility that relevant connecting factors might be established both with the Swiss Confederation — a State which must be treated as a Member State so far as the application of Regulation No 1408/71 is concerned — (the place where the employer is established) and with the territory of the European Union (levying of income tax in the Netherlands and, possibly, work on the territory of the Kingdom of the Netherlands and of the United Kingdom, if the work on board the pipe-laying vessel, at issue in the main proceedings, may — when the vessel was operating above the part of the continental shelf adjacent to those Member States — be regarded as work on the territory of those States). However, the referring court observes that, assuming the last-mentioned factor to be relevant, the question arises whether it must be taken into account solely for the periods when the vessel was operating above the part of the continental shelf adjacent to those Member States, or for the entire period at issue: the answer may ultimately depend on what had originally been planned.

28

On the assumption that Mr Kik comes within the scope *ratione personae* of Regulation No 1408/71 and that the rules in Title II thereof must thus be applied in order to determine the social security legislation applicable, the referring court raises the question of what might be the relevant rule.

29

It considers that the place of work is an important factor and that it is therefore necessary, also in this regard, to ascertain whether employment on board a pipe-laying vessel operating above the part of the continental shelf adjacent to a Member State is to be regarded as employment on the territory of that Member State.

If that is not the case, the referring court considers that no rule in Title II of Regulation No 1408/71 applies as such. Accordingly, since it is unacceptable for a worker to whom the regulation applies not to be subject to any social security scheme, the referring court considers it necessary to identify the most relevant connecting factor. In the case before it, the employee's residence must, in its view, be discounted, since there is no indication of any link whatsoever between his residence and the employment relationship. The same is true of the place in which his employment income is taxed, since Regulation No 1408/71 attaches no significance to that factor. By a process of elimination, the place where the employer is established assumes particular significance, the national court referring in that regard to the judgment in *Aldewereld* (EU:C:1994:271).

If employment on board a pipe-laying vessel operating above the part of the continental shelf adjacent to a Member State is to be treated as employment on the territory of that Member State, the Hoge Raad der Nederlanden contemplates two possible approaches.

The first is to refer to the main rule in Article 13(2)(a) of Regulation No 1408/71, which designates the legislation of the place of work, and, consequently, to apply the legislation of the Netherlands and that of the United Kingdom in respect of the periods during which the work is to be regarded as having been carried out in the territory of each of those Member States, with Swiss legislation being applicable as to the remainder, for the same reasons as those set out in paragraph 30 of this judgment.

Following the second approach contemplated by the referring court, the person would be regarded as having been normally employed in the territory of two or more Member States, as referred to in Article 14(2) of Regulation No 1408/71, and, consequently, the rule set out in the first situation mentioned in Article 14(2)(b)(i) of the regulation would apply: that approach would result in the legislation of the Member State of residence being applicable, since the activity was partly pursued there.

The referring court considers that the fact that Article 14 of Regulation No 1408/71, according to the wording of its title, contains special rules applicable to persons, other than mariners, engaged in paid employment might not be decisive, since Article 14b of the regulation, which sets out the special rules applicable to mariners, contains no provision that is applicable in the case before it.

The referring court is, however, uncertain about the distinction that should be made between the case referred to in Article 14(2) of Regulation No 1408/71 and the case in which a person is employed first in one Member State and then in another Member State, a situation governed by Article 13(2)(a) of the regulation, since, strictly speaking, two activities can never be carried out simultaneously by the same person in two different places. As a consequence, the expression 'a person normally employed in the territory of two or more Member States', which is used in Article 14(2) of the regulation, also encompasses an activity which is carried out in two or more Member

States in succession. An over-strict interpretation of that expression would be unfavourable for the free movement of workers, since it would mean that workers not covered by the special rule set out in Article 14(2) would be subject to Article 13(2)(a) of Regulation No 1408/71 and, as a result, would be subject to frequent changes in the legislation applicable to them.

36

In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)

(a)

Must the rules regarding the scope *ratione personae* of Regulation No 1408/71 and the rules which determine the territorial scope of the designation rules in Title II of that regulation be interpreted as meaning that those designation rules apply in a case such as the present, which concerns (i) a worker residing in the Netherlands who (ii) is a national of the Netherlands, (iii) in any event, was previously compulsorily insured in the Netherlands, (iv) is employed as a seafarer by an employer established in Switzerland, (v) carries out his work on board a pipe-laying vessel which flies the Panamanian flag, and (vi) carries out those activities first outside the territory of the European Union (approximately 3 weeks above the continental shelf of the United States and approximately 2 weeks in international waters) and then above the continental shelf of the Netherlands (periods of one month and approximately one week) and of the United Kingdom (a period of slightly more than one week), while (vii) the income earned thereby is subject to income tax levied by the Netherlands?

(b)

If so, is Regulation No 1408/71 then applicable only on the days when the person concerned works above the continental shelf of a Member State of the European Union, or also during the preceding period in which he worked elsewhere outside the territory of the Union?

(2)

If Regulation No 1408/71 applies to a worker as referred to in question 1(a), what legislation or sets of legislation does the regulation then designate as applicable?’

The questions referred for a preliminary ruling

The first question

37

By its first question the national court asks, in essence, whether Regulation No 1408/71 must be interpreted to the effect that the persons covered by it include an employed person who, like Mr Kik, is a national of a Member State, in which he resides and in which his income is subject to tax, works on a pipe-laying vessel flying the flag of a third State and operating in various parts of the world, in particular above the part of the continental shelf adjacent to certain Member States, was previously employed by an undertaking established in his Member State of residence, changes employer and thereafter is employed by an undertaking established in Switzerland, whilst continuing to reside in the same Member State and to sail on the same vessel.

38

In that regard, the Court observes, first, that, under Article 2(1), Regulation No 1408/71 applies, *inter alia*, to employed persons who are, or have been, subject to the legislation of one or more Member States and who are nationals of one of the Member States.

39

It is clear from the order for reference that during the period at issue in the main proceedings that was the case of Mr Kik. He is a Netherlands national and was insured, during that period, with the Netherlands social security scheme by reason of his residence in the Netherlands. Furthermore, although the dispute in the main proceedings concerns the question whether Mr Kik was subject, during the period concerned, to the Netherlands legislation or to the Swiss legislation, it is not disputed that he was subject to one or other of those sets of legislation.

40

Second, the Court notes that the work carried out on board a pipe-laying vessel cannot be treated as work carried out on the territory of a Member State when the vessel is located above the part of the continental shelf adjacent to that Member State.

41

That is because the jurisdiction which Article 79(4) of the Convention on the Law of the Sea confers on a coastal State is limited to cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of the latter's resources and thus does not extend to a vessel which is concerned with laying those cables or pipelines. Nor can such a vessel be regarded as an 'artificial island', an 'installation' or a 'structure' on the continental shelf, within the meaning of Article 80 of that convention. In any event, there is no indication in the order for reference that the pipelines laid by the vessel on which Mr Kik was working during the periods when it was above the part of the continental shelf adjacent to certain Member States were intended for the exploration of the continental shelf or the exploitation of its resources.

42

However, in a situation such as Mr Kik's, the finding that the work carried out on board a pipe-laying vessel cannot be treated as work carried out on the territory of a Member State when the vessel is located above the part of the continental shelf adjacent to that Member State is not, on its own, capable of calling into question the applicability of Regulation No 1408/71. Indeed, 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 the free movement of workers, as long as the employment relationship retains a sufficiently close connection with the Union (judgment in *Aldewereld*, EU:C:1994:271, paragraph 14).

43

In that regard, it is clear from the Court's case-law that a sufficiently close connection between the employment relationship in question and the territory of the European Union derives, *inter alia*, from the fact that a European Union 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 (see, to that effect, judgment in *Petersen*, C-544/11, EU:C:2013:124, paragraph 42).

44

As the Advocate General has observed in point 40 of his Opinion, Mr Kik's employment during the period at issue in the main proceedings is characterised by a number of factors establishing a connection with the territory of the Kingdom of the Netherlands and that of the Swiss Confederation (a State treated as a Member State for the purposes of Regulation No 1408/71). It is sufficient to note in that regard that Mr Kik was resident in the Netherlands and that his employer was established in Switzerland.

45

In view of the foregoing considerations, the answer to the first question is that Regulation No 1408/71 must be interpreted to the effect that the persons covered by it include an employed person who, like Mr Kik, is a national of a Member State, in which he resides and in which his income is subject to tax, is employed on a pipe-laying vessel flying the flag of a third State and operating in various parts of the world, in particular above the part of the continental shelf adjacent to certain Member States, was previously employed by an undertaking established in his Member State of residence, changes employer and thereafter is employed by an undertaking established in Switzerland, whilst continuing to reside in the same Member State and to sail on the same vessel.

The second question

46

By its second question — which has been raised in the event of Regulation No 1408/71 being applicable to a worker such as Mr Kik and which the Court must therefore answer — the referring court asks what legislation is designated as applicable to such a worker by the provisions determining the national legislation applicable, which are contained in Title II of the regulation.

47

In that regard, the Court observes that, where a person falls within the scope *ratione personae* of Regulation No 1408/71, as defined in Article 2 thereof, the rule in Article 13(1) of the regulation that the legislation of a single Member State is to apply is in principle applicable and the national legislation applicable is determined in accordance with the provisions of Title II of the regulation (judgment in *Aldewereld*, EU:C:1994:271, paragraph 10).

48

In paragraph 11 of *Aldewereld* the Court stated that none of the provisions of Title II of Regulation No 1408/71 relate directly to the situation of a person who has been employed by an undertaking in the European Union but who does not engage in any activity within the Union because he works exclusively in the territory of a third State.

49

A situation in which a person has been employed by an undertaking in the European Union to work on a vessel flying the flag of a third State must be treated in the same way as the situation mentioned in the previous paragraph.

50

That is so regardless of the introduction — after the period that was relevant for the purposes of

the judgment in *Aldewereld* — of Article 13(2)(f) of Regulation No 1408/71, under which 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 by virtue of another provision of Title II of the regulation, is to be subject to the legislation of the Member State in whose territory he resides.

51

In that regard, it should be recalled that the fact that the legislation of a Member State ceases to be applicable constitutes a condition for the application of that provision, and that that provision does not itself define the conditions in which the legislation of a Member State ceases to be applicable (see *Commission v Belgium*, C-347/98, EU:C:2001:236, paragraph 31). As the Court has stated, *inter alia*, in paragraph 33 of the judgment in *van Pommeren-Bourgondiën* (C-227/03, EU:C:2005:431), it is for the legislation of each Member State to lay down those conditions.

52

Indeed, as is stated in Article 10b of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ English Special Edition 1972 (I), p. 160), as amended and updated by Regulation No 118/97, the date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of Regulation No 1408/71 are to be determined in accordance with that legislation.

53

Under Netherlands law, the social security legislation of the Netherlands continued to be applicable to Mr Kik throughout the whole of the period at issue. Since the condition relating to the fact that the legislation of a Member State ceases to apply has not been met, Article 13(2)(f) of Regulation No 1408/71 is not applicable in a situation such as that in issue in the main proceedings.

54

Accordingly, in such a situation, as long as the employment relationship has a sufficiently close connection with the territory of the European Union, legislation is designated as applicable by reference to the provisions of Title II of Regulation No 1408/71 other than Article 13(2)(f).

55

As has been found in paragraph 44 of this judgment, there is a sufficiently close connection with the territory of the European Union in a situation such as Mr Kik's.

56

When it comes to determining what legislation is applicable in such a situation by virtue of Regulation No 1408/71, it must be held that the general rule in Article 13(2)(c) of the regulation, which designates the legislation of the flag Member State in relation to mariners, is not applicable by analogy, since, in the case before the referring court, the person concerned is working on a vessel flying the flag of a third State.

57

In such a situation, the Court has held that the applicable legislation is derived from the provisions of Title II of Regulation 1408/71, account being taken of the factors connecting the particular situation with the legislation of the Member States (see judgment in *Aldewereld*, EU:C:1994:271,

paragraph 20).

58

In the present case, just as in *Aldewereld* (EU:C:1994:271, paragraph 21), the only factors connecting the situation with the legislation of a Member State, or of a State treated as such, are the residence of the employee and the place where the employer is established. As the Court stated in paragraph 22 of *Aldewereld*, according to the scheme of Regulation No 1408/71, application of the legislation of the Member State in which the worker resides appears to be an ancillary rule which comes into play only where that legislation has a link with the employment relationship. Thus, when the worker does not reside in any of the Member States where he works, it is normally the legislation of the Member State where his employer has its registered office or place of business which applies.

59

In a situation such as that at issue in the main proceedings, support for that finding is given by the first sentence of Article 14(2)(a) of Regulation No 1408/71. That provision indicates the scheme of the regulation with regard to persons whose work is essentially itinerant and carried out in circumstances that do not permit it to be connected to one particular place; under that provision the legislation of the Member State in which the employer has its registered office or place of business is applicable to those persons.

60

Even though Article 14 of Regulation No 1408/71 contains — as is apparent from its title — rules applicable to persons other than mariners, the situation at issue in the main proceedings, namely that of an employee carrying out his work outside the territory of the European Union on board a vessel flying the flag of a third State, is comparable to that of persons directly concerned by that provision, inasmuch as neither the flag State nor the place of work is connected with the legislation of a Member State.

61

Consequently, in the situation of a worker such as Mr Kik, the applicable legislation is that of the Member State, or the State treated as such, in which his employer has its registered office or place of business.

62

However, in view of the fact that the Court does not have any information concerning the nature of the insurance scheme provided for by the Swiss legislation and given that, under the Netherlands legislation, it is the latter that governs the situation of an employee such as Mr Kik during the period at issue in the main proceedings in that it provides that such a person is to be insured under a compulsory scheme, it must be stated that, in accordance with the first indent of Article 15(2) of Regulation No 1408/71, where application of the legislation of two or more Member States (and the Swiss Confederation must be treated as such) entails insurance under a voluntary insurance scheme and under a compulsory insurance scheme, the person concerned is to be subject exclusively to the compulsory insurance scheme.

63

If, pursuant to Regulation No 1408/71, the legislation of the State in which the employer is established does not provide for an employee such as Mr Kik to be insured under any social

security scheme, the legislation of the Member State of residence of the employee will apply. It must be recalled that Title II of Regulation No 1408/71 is also intended to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (judgment in *van Pommeren-Bourgondiën*, EU:C:2005:431, paragraph 34 and the case-law cited).

64

In view of all the foregoing considerations, the answer to the second question is that the provisions determining the national legislation applicable, which are contained in Title II of Regulation No 1408/71, must be interpreted as meaning that a national of a Member State, or of the Swiss Confederation (a State treated as a Member State for the purposes of applying the regulation), who is employed on board a vessel flying the flag of a third State and carries out his activities outside the territory of the European Union — including above the continental shelf of a Member State — but who is employed by an undertaking established in the Swiss Confederation, is subject to the legislation of the State in which his employer is established. However, in circumstances such as those of the main proceedings, if, pursuant to Regulation No 1408/71, application of that legislation results in him being insured under a voluntary insurance scheme or not being insured under any social security scheme, that national will be subject to the legislation of his Member State of residence.

Costs

65

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 (Fifth Chamber) hereby rules:

1.

Regulation (EEC) No 1408/71 of the Council 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 the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999, must be interpreted to the effect that the persons covered by it include an employed person who, like Mr Kik, is a national of a Member State, in which he resides and in which his income is subject to tax, is employed on a pipe-laying vessel flying the flag of a third State and operating in various parts of the world, in particular above the part of the continental shelf adjacent to certain Member States, was previously employed by an undertaking established in his Member State of residence, changes employer and thereafter is employed by an undertaking established in Switzerland, whilst continuing to reside in the same Member State and to sail on the same vessel.

2.

The provisions determining the national legislation applicable, which are contained in Title II of Regulation No 1408/71, must be interpreted as meaning that a national of a Member State, or of the Swiss Confederation (a State treated as a Member State for the purposes of applying the

regulation), who is employed on board a vessel flying the flag of a third State and carries out his activities outside the territory of the European Union — including above the continental shelf of a Member State — but who is employed by an undertaking established in the Swiss Confederation, is subject to the legislation of the State in which his employer is established. However, in circumstances such as those of the main proceedings, if, pursuant to Regulation No 1408/71, application of that legislation results in him being insured under a voluntary insurance scheme or not being insured under any social security scheme, that national will be subject to the legislation of his Member State of residence.

[Signatures]

(*1) Language of the case: Dutch.