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JUDGMENT OF THE COURT (Tenth Chamber)

18 January 2018 (*1)

(Reference for a preliminary ruling — Free movement of capital — Articles 63 and 65 TFEU — Regulation (EC) No 883/2004 — Article 11 — Levies on income from assets contributing to the financing of the social security scheme of a Member State — Exemption for nationals of the European Union affiliated to a social security scheme of another Member State — Natural persons affiliated to a social security scheme of a third country — Difference of treatment — Restriction — Justification)

In Case C?45/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 25 January 2017, received at the Court on 30 January 2017, in the proceedings

Frédéric Jahin

v

Ministre de l'Économie et des Finances,

Ministre des Affaires sociales et de la Santé,

THE COURT (Tenth Chamber),

composed of A. Borg Barthet, acting as President of the Chamber, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

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Mr Jahin, by E. d'Onorio di Meo, avocat,

–

the French Government, by D. Colas and R. Coesme, acting as Agents,

–

the European Commission, by D. Martin and L. Malferrari, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Articles 63 to 65 TFEU and of Article 11 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

2

The request has been made in the context of proceedings between Mr Frédéric Jahin, on the one hand, and the ministre de l'Économie et des Finances (Minister for Economic Affairs and Finance, France) and the ministre des Affaires sociales et de la Santé (Minister for Social Affairs and Health, France), on the other hand, concerning the payment of several fiscal contributions and levies for the years 2012 to 2014, relating to income from assets received in France.

Legal context

EU law

3

Regulation No 883/2004 repealed, with effect from 1 May 2010, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to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) ('Regulation No 1408/71'). The provisions of Regulation No 883/2004 relevant to the present case have not, however, undergone any substantial amendments in comparison with those which corresponded to them in the repealed regulation.

4

Article 2 of Regulation No 883/2004, entitled 'Persons covered', provides in paragraph 1:

'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

5

Article 3(1) of that regulation provides:

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

(a)

sickness benefits;

(b)

maternity and equivalent paternity benefits;

(c)

invalidity benefits;

(d)

old-age benefits;

(e)

survivors’ benefits;

(f)

benefits in respect of accidents at work and occupational diseases;

(g)

death grants;

(h)

unemployment benefits;

(i)

pre-retirement benefits;

(j)

family benefits.’

6

Article 11(1) of that regulation provides:

‘Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. …’

7

Regulation No 883/2004 applies to all Member States of the European Economic Area (EEA) pursuant to Decision No 76/2011 of the EEA Joint Committee of 1 July 2011 amending Annex VI (Social Security) and Protocol 37 to the EEA Agreement (OJ 2011 L 262, p. 33).

8

Furthermore, as regards the Swiss Confederation, pursuant to Article 8 of 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 (OJ 2002 L 114, p. 6), which came into force on 1 June 2002, the Contracting Parties are to make provision, in

accordance with Annex II to that agreement, for the coordination of social security systems. 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 came into force on 1 April 2012, section A of that annex was updated and now refers to Regulation No 883/2004.

French law

9

Pursuant to Article 1600-0 C of the Code général des impôts (General Tax Code), in the version applicable to the facts in the main proceedings:

‘The general social contribution on income from assets shall be established, monitored and collected in accordance with Article L. 136?6 of the code de la sécurité sociale (Social Security Code).’

10

Article L. 136-6 of the Social Security Code, as amended by Law No 2012-958 of 16 August 2012, is worded as follows:

‘I. — Natural persons who are resident for tax purposes in France, within the meaning of Article 4 B of the General Tax Code, shall be subject to a contribution in respect of income from assets that is based on the net amount adopted for the assessment of income tax …

Ia. — Natural persons who are not resident for tax purposes in France, within the meaning of Article 4 B of the General Tax Code, shall also be subject to the contribution in respect of the net income amount, referred to in point I of Article 164 B of that code, adopted for the assessment of income tax.

…’

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

11

Mr Jahin, a French national, has lived in China since 2003. He pursues a professional activity in China and is affiliated to a private social security scheme there.

12

Between 2012 and 2014, he was subject, in France, to various levies on income from real estate and on a capital gain realised on the transfer of immovable property.

13

Having already been requested to deliver a preliminary ruling by the referring court, the Conseil d’État (Council of State, France), in another case relating to identical levies, which gave rise to the judgment of 26 February 2015, de Ruyter (C?623/13, EU:C:2015:123), the Court held, in essence, that such levies, in so far as they have a direct and relevant link with some of the branches of social security listed in Article 4 of Regulation No 1408/71, come within the scope of that regulation and are subject to the principle that the legislation of a single Member State only is to apply, laid

down by Article 13(1) of that regulation, even though they are imposed on the income from assets of taxable persons, irrespective of the pursuit of any professional activity.

14

Following that judgment, the referring court held, by a ruling of 27 July 2015, that any natural person affiliated to a social security scheme in another Member State is entitled to seek the discharge of the contributions which were imposed, in France, on the income received from his assets.

15

The detailed arrangements for reimbursement of the levies paid in breach of EU law were set out by two press releases of 20 October 2015 issued by the secrétaire d'État chargé du Budget (Minister of State for Finance and Public Accounts, with responsibility for the Budget, France) and by the directeur général des Finances publiques (Director-General for Public Finance, France). It is stated therein, inter alia, that the right to reimbursement is confined solely to natural persons affiliated to a social security scheme of a State other than the French Republic within the European Union, the EEA or the Swiss Confederation, thus excluding natural persons affiliated to a social security scheme in a third country.

16

On 11 March 2016, Mr Jahin brought an action before the referring court seeking annulment of those press releases as being ultra vires, claiming that that exclusion is contrary to Regulation No 883/2004 and to the principle of the free movement of capital guaranteed by Article 63 TFEU.

17

In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Must Articles 63, 64 and 65 TFEU be interpreted as meaning that:

(1)

the fact that a person insured under a social security scheme in a third country outside the European Union, other than members of the [EEA] or [the Swiss Confederation], is subject to contributions on income from assets provided for under French legislation and coming within the scope of Regulation [No 883/2004], in the same way as persons insured under the social security scheme in France, whereas a person insured under the social security scheme of a Member State other than [the French Republic] cannot be subject to those contributions, taking into account the provisions of that regulation, constitutes a restriction on the movement of capital from and to third countries, which is in principle prohibited by Article 63 TFEU;

(2)

if that first question is answered in the affirmative, can that restriction on the movement of capital, which arises as a combined result of French legislation, which imposes the disputed contributions on all recipients of certain income from assets, without in itself making any distinction as to the place in which they are insured under a social security scheme, and a European Union act of secondary legislation, be regarded as compatible with the requirements of the said article of the [FEU Treaty], in particular:

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in light of Article 64(1) [TFEU], for the movement of capital coming within the scope of that paragraph, on the ground that the restriction arises due to the application of the principle that the legislation of a single Member State is to apply, as provided in Article 11 of the Regulation [No 883/2004], introduced into EU law by Article 13 of Regulation [No 1408/71], in other words, on a date prior to 31 December 1993, even though the contributions on income from the assets in question were established or made applicable after 31 December 1993;

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in light of Article 65(1) [TFEU], on the grounds that the French tax legislation, when applied in a way compliant with Regulation [No 883/2004] of 29 April 2004, creates a distinction between taxable persons whose situations differ in relation to the criterion for being insured under a social security scheme;

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in light of the existence of overriding reasons in the public interest to justify a restriction on the free circulation of capital, derived from the fact that the provisions that might be regarded as restricting the movement of capital from or to a third country correspond to the aim of Regulation [No 883/2004] of allowing free movement of workers within the European Union?'

Consideration of the questions referred

18

By its two questions, which should be considered together, the referring court asks, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a national of that Member State, who resides in a third country other than an EEA Member State or the Swiss Confederation and is affiliated to a social security scheme in that third country, is subject, in that Member State, to levies on income from assets for the purpose of contributing to the social security scheme established by that Member State, whereas an EU national covered by a social security scheme of another Member State is exempted therefrom by reason of the principle that the legislation of a single Member State only is to apply in matters of social security, as laid down in Article 11 of Regulation No 883/2004, in so far as such national legislation constitutes a prohibited restriction on the movement of capital from or to third countries.

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First of all, it must be borne in mind that Article 63 TFEU gives effect to the free movement of capital, first, between Member States and, secondly, between Member States and third countries.

20

To that end, Article 63 TFEU, which features in Chapter 4, entitled 'Capital and payments', of Title IV of the FEU Treaty, provides that all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited.

21

It follows that the territorial scope of the free movement of capital laid down in Article 63 TFEU is

not limited to the movement of capital between Member States, but also extends to such movement between Member States and third countries.

22

With regard to the material scope of Article 63 TFEU, while the FEU Treaty does not define the concept of ‘movement of capital’, it is apparent from settled case-law of the Court that such movement within the meaning of that article includes investments in property within the territory of a Member State by non-residents (see, to that effect, judgments of 11 January 2001, Stefan, C?464/98, EU:C:2001:9, paragraph 5; of 5 March 2002, Reisch and Others, C?515/99, C?519/99 to C?524/99 and C?526/99 to C?540/99, EU:C:2002:135, paragraph 30; and of 8 September 2005, Blanckaert, C?512/03, EU:C:2005:516, paragraph 35).

23

It follows from the foregoing that levies, such as those made under the national legislation at issue in the main proceedings, in so far as they relate to income from real estate and to capital gains realised following the transfer of immovable property received in a Member State by a natural person who holds the nationality of that State but resides in a third country other than an EEA Member State or the Swiss Confederation, come within the concept of ‘movement of capital’ within the meaning of Article 63 TFEU.

24

It is next necessary to determine whether the tax treatment reserved by the national legislation at issue to its nationals who reside in a third country other than an EEA Member State or the Swiss Confederation and are affiliated to a social security scheme of that third country constitutes a restriction on the movement of capital within the meaning of Article 63 TFEU.

25

It follows from settled case-law of the Court that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State’s residents from doing so in other States (judgments of 23 February 2006, van Hilten-van der Heijden, C?513/03, EU:C:2006:131, paragraph 44; of 26 May 2016, NN (L) International, C?48/15, EU:C:2016:356, paragraph 44, and of 2 June 2016, Pensioenfonds Metaal en Techniek, C?252/14, EU:C:2016:402, paragraph 27).

26

In the present case, it is common ground that the French legislation treats in the same way, on the one hand, its nationals who reside in a third country other than an EEA Member State or the Swiss Confederation and are affiliated to a social security scheme in that third country and, on the other hand, French nationals who reside in France and are affiliated to a social security scheme there, since in both cases they are equally subject to the levies on capital income provided for by that national legislation.

27

By contrast, more favourable tax treatment is reserved to EU nationals affiliated to a social security scheme in another Member State, an EEA Member State or the Swiss Confederation, given that they are exempt from those levies.

28

Such a difference in treatment is liable to dissuade natural persons affiliated to a social security scheme of a third country other than the EEA Member States or the Swiss Confederation from making investments in immovable property in the Member State whose nationality they hold and is, therefore, liable to hinder the movement of capital from such third countries to that Member State.

29

Consequently, national legislation, such as that at issue in the main proceedings, constitutes a restriction on the free movement of capital between a Member State and a third country, which is, in principle, prohibited by Article 63 TFEU.

30

Finally, it is necessary to assess whether such a restriction on the free movement of capital may be justified.

31

Article 65(1)(a) TFEU states that ‘the provisions of Article 63 shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence’.

32

It is apparent from settled case-law of the Court that that provision, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence is automatically compatible with the Treaty (judgments of 17 October 2013, Welte, C?181/12, EU:C:2013:662, paragraph 42, and of 7 November 2013, K, C?322/11, EU:C:2013:716, paragraph 34).

33

The derogation provided for in Article 65(1) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) TFEU ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63’ (judgment of 17 October 2013, Welte, C?181/12, EU:C:2013:662, paragraph 43).

34

A distinction must therefore be drawn between unequal treatment which is permitted under Article 65(1) TFEU and arbitrary discrimination which is prohibited by reason of Article 65(3) TFEU. In that respect, it follows from settled case-law of the Court that, in order for a national provision, such as that at issue in the main proceedings, to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest (judgments of 6 June 2000, Verkooijen, C?35/98, EU:C:2000:294, paragraph 43; of 7 September 2004, Manninen, C?319/02, EU:C:2004:484, paragraphs 28 and 29; and of 8 September 2005, Blanckaert, C?512/03, EU:C:2005:516, paragraph 42).

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The question therefore arises as to whether, as regards the collection of levies such as those at issue in the main proceedings, there is an objective difference in situation, in terms of their residence, between an EU national covered by a social security scheme of a Member State other than that of the Member State concerned and a national of that Member State affiliated to a social security scheme in a third country, other than an EEA Member State or the Swiss Confederation.

36

In that regard, it should be noted that the criterion used by the national legislation at issue in the main proceedings to differentiate the situation between natural taxable persons is not explicitly linked to their residence, but is based on their affiliation to a social security scheme.

37

Nevertheless, in so far as natural persons not affiliated to a social security scheme of a Member State are, more often than not, not resident in that Member State, such a criterion in fact makes a distinction between natural taxable persons on the basis of their residence (see, to that effect, judgment of 8 September 2005, Blanckaert, C?512/03, EU:C:2005:516, paragraph 38).

38

It is therefore necessary to ascertain whether an EU national affiliated to a social security scheme of another Member State is, having regard to the objective, the purpose and the content of the legislation of that Member State, in a situation comparable to that of a national of that Member State, but who resides in a third country other than an EEA Member State or the Swiss Confederation, and is affiliated to a social security scheme in that third country (see, to that effect, judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C?252/14, EU:C:2016:402, paragraph 48).

39

As regards, in the present case, the objective of the French legislation, it must be borne in mind, as noted in paragraphs 13 to 15 of the present judgment, that the press releases at issue in the main proceedings merely clarify the detailed arrangements for the reimbursement of levies collected in breach of EU law in respect of natural persons who receive income from assets in France but are covered by the social security scheme of another Member State.

40

In accordance with the principle that the legislation of a single Member State only is to apply in matters of social security, as laid down by Article 11 of Regulation No 883/2004, a Member State

is not allowed, in respect of EU nationals affiliated to a social security scheme of another Member State, to collect levies, such as those at issue in the main proceedings, which, although categorised as a tax under national legislation, have a direct and sufficiently relevant link to the legislation governing the branches of social security listed in Article 3(1) of Regulation No 883/2004 and are specifically allocated to the funding of the social security scheme of the first Member State (see, to that effect, judgment of 26 February 2015, de Ruyter, C?623/13, EU:C:2015:123, paragraphs 23, 24, 26 and 39).

41

That principle that the legislation of a single Member State applies in matters of social security is designed, as regards EU nationals who move within the European Union, to avoid the complications which may ensue from the simultaneous application of a number of national legislative systems and to eliminate the unequal treatment which would be the consequence of a partial or total overlapping of the applicable legislation (see, to that effect, judgment of 26 February 2015, de Ruyter, C?623/13, EU:C:2015:123, paragraph 37 and the case-law cited).

42

It follows from the foregoing considerations that there is an objective difference between, on the one hand, the situation of a national of the Member State concerned who resides in a third country other than an EEA Member State or the Swiss Confederation and is affiliated to a social security scheme in that third country and, on the other hand, the situation of an EU national affiliated to a social security scheme of another Member State, in so far as that latter national alone is liable to benefit from the principle that the legislation of a single Member State only is to apply in matters of social security, as laid down by Article 11 of Regulation No 883/2004, by reason of his movement within the European Union.

43

By contrast, there is no objective difference between the situation of a national of a Member State who resides in a third country, other than an EEA Member State or the Swiss Confederation, and is affiliated to a social security scheme in that third country, and that of a national of that Member State who resides there and is affiliated to a social security scheme there, in so far as, in both cases, they have not made use of the freedom of movement within the European Union and cannot, therefore, rely on the principle that the legislation of a single Member State only is to apply in matters of social security.

44

It follows that national legislation such as that at issue in the main proceedings may be justified, having regard to Article 65(1)(a) TFEU, by the objective difference in situation which exists between a natural person who is a national of a Member State but resides in a third country, other than an EEA Member State or the Swiss Confederation, and is affiliated to a social security scheme in that third country and an EU national residing and affiliated to a social security scheme in another Member State.

45

In any event, it must be added that a different interpretation would amount to granting a national of a Member State residing in a third country, other than an EEA Member State or the Swiss Confederation, such as Mr Jahin, protection under the principle that the legislation of a single Member State only is to apply in matters of social security, laid down in Article 11 of Regulation No

883/2004, even though, in accordance with Article 2(1) of that regulation, that principle applies only to nationals of a Member State who are subject to the social legislation of one or more Member States.

46

However, since the FEU Treaty does not contain any provision extending the free movement of workers to persons who migrate to a third country, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries, other than the EEA Member States or the Swiss Confederation, does not enable persons who do not come within the territorial scope of the free movement of workers to profit from that freedom (see, to that effect, judgment of 13 November 2012, Test Claimants in the FII Group Litigation, C?35/11, EU:C:2012:707, paragraph 100).

47

In the light of the foregoing, the answer to the questions referred is that Articles 63 and 65 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a national of that Member State who resides in a third country other than an EEA Member State or the Swiss Confederation and is affiliated to a social security scheme in that third country is subject, in that Member State, to levies on income from assets for the purpose of contributing to the social security scheme established by that Member State, whereas an EU national covered by a social security scheme of another Member State is exempted therefrom by reason of the principle that the legislation of a single Member State only is to apply in matters of social security pursuant to Article 11 of Regulation No 883/2004.

Costs

48

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Articles 63 and 65 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a national of that Member State who resides in a third country other than a Member State of the European Economic Area (EEA) or the Swiss Confederation and is affiliated to a social security scheme in that third country is subject, in that Member State, to levies on income from assets for the purpose of contributing to the social security scheme established by that Member State, whereas an EU national covered by a social security scheme of another Member State is exempted therefrom by reason of the principle that the legislation of a single Member State only is to apply in matters of social security pursuant to Article 11 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.

[Signatures]

(*1) Language of the case: French.