ORDER OF THE COURT (Sixth Chamber)

5 September 2019 (*)

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Freedom of movement for workers — Equal treatment — Article 45 TFEU — Regulation (EC) No 883/2004 — Article 4 — Social security convention concluded between the Member State of employment and a non-member country — Family allowances — Application to a frontier worker who is neither a national nor a resident of one of the Contracting States to the convention)

In Case C?801/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the conseil supérieur de la sécurité sociale (Luxembourg), made by decision of 17 December 2018, received at the Court on 19 December 2018, in the proceedings

EU

v

Caisse pour l’avenir des enfants,

THE COURT (Sixth Chamber),

composed of C. Toader, President of the Chamber, A. Rosas (Rapporteur) and M. Safjan, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU, of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), and of Article 4 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 proceedings between EU and the Caisse pour l’avenir des enfants (Children’s Future Fund, Luxembourg) concerning the latter’s refusal to grant family allowances to EU’s child, who lives with her mother in a non-member country.

Legal context

The Social Security Convention of 1965

3 The Social Security Convention between the Grand-Duchy of Luxembourg and the United States of Brazil, signed in Rio de Janeiro on 16 September 1965 (*Mémorial* A 1966, p. 621), in the version applicable to the facts of the dispute in the main proceedings ('the Social Security Convention of 1965'), provided in Article 1:

'The purpose of the present Convention is to regulate, on the basis of equal treatment, the social security of nationals of the High Contracting Parties.'

4 Article 2 of that convention provided:

'The Convention shall apply to health insurance, maternity insurance, disability insurance, old-age pensions, insurance against death and accidents at work and family allowances (excluding childbirth allowances provided on a non-contributory basis).'

5 Under Article 3(1) of that convention:

'Nationals of either of the Parties who habitually work within the territory of either of them shall be governed by the laws of that Party.'

6 Article 4 of that convention stated:

'Nationals of one Party who are entitled to cash benefits shall receive those benefits in their entirety and without restriction for as long as they reside within the territory of either of the Parties.'

Regulation No 883/2004

7 Under Article 4 of Regulation No 883/2004:

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

Luxembourg law

8 The Social Security Convention of 1965 was approved by the Grand-Duchy of Luxembourg by law of 12 July 1966 *(Mémorial* A 1966, p. 620).

9 The first paragraph of Article 269 of the Social Security Code, entitled 'Conditions of eligibility', provides:

'The following persons shall be entitled to family allowances, subject to the conditions laid down in this Chapter:

(a) any child, for his or her own benefit, actually living in Luxembourg on a continuous basis and officially resident there;

(b) for the benefit of the members of his or her family, in accordance with the international instrument applicable, any person subject to Luxembourg law and to whom Community regulations or any other bilateral or multilateral instrument relating to social security concluded by Luxembourg providing for the payment of family allowances in accordance with the legislation of the country of

employment apply. A child forming part of that person's family unit, as defined in Article 270, shall be regarded as a family member. The family members referred to in this provision must reside in one of the countries to which the regulations or instruments in question apply.'

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

10 On 8 December 2015, EU, a Portuguese national residing in France and working in Luxembourg, applied to the Caisse nationale des prestations familiales (National Agency for Family Benefits, Luxembourg) (now the Caisse pour l'avenir des enfants) for family allowances for his child, who lives with her mother in Brazil.

11 By decision of 6 June 2016, the Caisse pour l'avenir des enfants rejected that application on the ground that EU did not come within the scope of heading (b) of the first paragraph of Article 269 of the Social Security Code, since, as he did not have Brazilian or Luxembourg nationality, the Social Security Convention of 1965 did not apply to him.

12 Following an action brought by EU, the conseil arbitral de la sécurité sociale (Social Security Arbitration Board, Luxembourg), by judgment of 7 July 2017, dismissed that action as unfounded. It took the view that EU's child was not entitled to family allowances, either on her own account, since she did not actually live in Luxembourg on a continuous basis, or through her mother, who was not subject to Luxembourg law, or through her father, who did not come within the scope of the Social Security Convention of 1965, as he was neither a Luxembourg national nor a Brazilian national and his status as a frontier worker alone was insufficient for him to be classified as a Luxembourg national.

13 In the alternative, the conseil arbitral de la sécurité sociale (Social Security Arbitration Board) found that a question might arise as to whether the judgment of 15 January 2002, *Gottardo* , (C?55/00, EU:C:2002:16) might apply to the case in the main proceedings, but did not submit that question to the parties in the main proceedings or draw any legal inferences from it.

14 On 4 August 2017, EU appealed against the judgment of the conseil arbitral de la sécurité sociale (Social Security Arbitration Board) to the conseil supérieur de la sécurité sociale (Higher Social Security Board, Luxembourg), arguing that he is entitled to the payment of family allowances for his child.

15 EU submitted that, if he worked in France, he would be entitled to French family allowances for his child on the basis of the agreement between the French Republic and the Federative Republic of Brazil on social security matters, signed in Brasilia on 15 December 2011, and that, if he worked in Portugal, he would be entitled to Portuguese family allowances under a bilateral ' *Ibero-American*' agreement.

16 Relying on the principle of freedom of movement for workers within the European Union and referring to Article 45 TFEU, to Directive 2004/38 and to Regulation No 883/2004, EU claimed that he is entitled to Luxembourg family allowances, arguing that, if he does not receive those allowances, he would be at a particular disadvantage liable to discourage him from working in Luxembourg and which would amount to an infringement of the principle of freedom of movement for workers within the European Union.

17 In the alternative, EU relied on the judgment of 15 January 2002, *Gottardo* (C?55/00, EU:C:2002:16) and argued that the principle of equal treatment arising from the relevant provisions of EU law could be relied on against the institution of the Member State in which he is affiliated, in the case where there is a social security convention concluded between that Member State and the relevant non-member country. Furthermore, EU requested that a question be

referred to the Court of Justice for a preliminary ruling.

18 The Caisse pour l'avenir des enfants submitted that the judgment of the conseil arbitral de la sécurité sociale (Social Security Arbitration Board) should be upheld on the ground that neither the child, nor her mother, nor EU fulfilled the conditions for receiving family allowances laid down in Article 269 of the Social Security Code.

19 On 22 January 2018, the conseil supérieur de la sécurité sociale (Higher Social Security Board) requested the parties to the main proceedings to adopt a position on the application of the Social Security Convention of 1965 to persons who, as in the main proceedings, do not live in one of the States party to that convention, in view of Article 4 of that convention, which makes the award of cash benefits conditional on the relevant national living in one of those States.

20 In that regard, EU once again referred to the judgment of 15 January 2002, *Gottardo* (C?55/00, EU:C:2002:16) in order to argue that, in the light of the principle of equal treatment and freedom of movement for workers within the European Union, Article 4 of the Social Security Convention of 1965 cannot be relied on against him.

21 According to the Caisse pour l'avenir des enfants, in so far as, following the judgment of 15 January 2002, *Gottardo* (C?55/00, EU:C:2002:16), the Grand-Duchy of Luxembourg is now required, in order to avoid any discrimination based on nationality, to allow any national of a Member State to benefit from any international convention concluded between the Grand-Duchy of Luxembourg and a non-member country, EU is, in the main proceedings, not in the same objective situation as nationals of a State party to such a convention who are officially resident in that State.

22 The conseil supérieur de la sécurité sociale (Higher Social Security Board) finds that, because EU's child is not officially resident in Luxembourg and does not actually live there, she is not entitled to family allowances either on her own account, or through her mother, who is not subject to Luxembourg law, or through her father.

23 In order for that child to be able to receive family allowances as a member of the family of EU, the latter, according to the conseil supérieur de la sécurité sociale (Higher Social Security Board), who is subject to Luxembourg law due to the conclusion of his contract of employment in Luxembourg, would have to be covered by a bilateral convention. The scope of the Social Security Convention of 1965 has, under Articles 3 and 4 thereof, been limited to nationals and residents of one of the States party to that convention.

24 EU submits that those restrictions constitute an infringement of the principles of freedom of movement for workers within the European Union and of equal treatment, and refers, in particular, to Article 45 TFEU, under which freedom of movement for workers is to be secured within the European Union and is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, and to Regulation No 883/2004, in particular Article 4, which ensures that persons to whom the regulation applies enjoy the same benefits and are subject to the same obligations under the legislation of any Member State as are the nationals of that Member State.

25 The referring court notes that, in the judgment of 15 January 2002, *Gottardo* (C?55/00, EU:C:2002:16), the Court held that the competent social security authorities of one Member State are required, pursuant to their obligations under Article 39 EC (now Article 45 TFEU), to take account, for the purposes of the acquisition of the right to old-age benefits, of periods of insurance completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those competent authorities recognise, pursuant to a bilateral international convention concluded between the first Member State and that non-

member country, such periods where they have been completed by their own nationals.

26 The referring court considers that the question therefore arises as to whether, in relation to family allowances, the Social Security Convention of 1965 applies to EU even though he is neither a national nor a resident of either of the two States party to that convention.

27 In those circumstances, the conseil supérieur de la sécurité sociale (Higher Social Security Board) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are the competent social security authorities of one Member State [such as, in the main proceedings, the Caisse pour l’avenir des enfants] required, pursuant to their … obligations under Article 45 TFEU, [Directive 2004/38] and [Regulation No 883/2004], in particular Article 4 of that regulation, to pay family benefits to a national of a second Member State when, under identical conditions for the grant of those benefits, those competent authorities recognise the entitlement of their own nationals and residents to family benefits pursuant to a bilateral international convention concluded between the first Member State [(the Grand-Duchy of Luxembourg)] and the non-member country [(the United States of Brazil, now the Federative Republic of Brazil)]?

(2) In the affirmative, and in the event that the approach taken in [the judgment of 15 January 2002, *Gottardo*, (C?55/00, EU:C:2002:16)] is extended to the context of family benefits, can the competent social security authority, more particularly the competent authority for family benefits — [in this case] the Caisse pour l’avenir des enfants, the national agency of the Grand-Duchy of Luxembourg for family benefits — rely on objective grounds based on considerations relating to the [particularly] heavy financial and administrative burdens faced by the authority in question to justify a difference in treatment between nationals of [States that are Contracting Parties] (to the bilateral convention concerned) and other nationals of [EU] Member States?’

Consideration of the questions referred

28 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 45 TFEU, read in conjunction with Article 4 of Regulation No 883/2004, must be interpreted as precluding the competent authorities of one Member State from refusing to pay to a national of a second Member State, who works in the first Member State without living there, family benefits for his child living in a non-member country with her mother when, under identical conditions for the grant of those benefits, those authorities recognise the entitlement of their own nationals and residents to family benefits, pursuant to a bilateral international convention concluded between the first Member State and that non-member country. As appropriate, the referring court seeks to ascertain whether considerations relating to the heavy financial and administrative burdens faced by the authority concerned may be relied on to provide objective justification for a difference in treatment between nationals of States that are parties to the bilateral convention concerned and nationals of other EU Member States.

29 Under Article 99 of its Rules of Procedure, where, inter alia, the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

30 That provision must be applied in the present case.

31 In the present case, it is common ground that EU works in Luxembourg as a frontier worker, is affiliated to the Luxembourg social security regime and is subject to income tax in Luxembourg.

As he comes under Luxembourg law as a result of the conclusion of his contract of employment in Luxembourg, EU applied for family allowances for his child on the basis of heading (b) of the first paragraph of Article 269 of the Social Security Code, according to which ‘for the benefit of the members of his or her family, in accordance with the international instrument applicable, any person subject to Luxembourg law and to whom Community regulations or any other bilateral or multilateral instrument relating to social security concluded by Luxembourg providing for the payment of family allowances in accordance with the legislation of the country of employment apply’ is entitled to family allowances.

32 It should be recalled, first of all, that it follows from the Court’s settled case-law that any national of the European Union, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has worked in a Member State other than that of his residence comes within the scope of Article 45 TFEU (see, inter alia, judgments of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraph 76; of 28 February 2013, *Petersen*, C?544/11, EU:C:2013:124, paragraph 34, and of 14 March 2019, *Jacob and Lennertz*, C?174/18, EU:C:2019:205, paragraph 21).

33 In view of the questions referred in the present case, it is appropriate, next, to recall the Court’s case-law relating to the application of the principle of equal treatment in the context of the relationship between EU law and bilateral conventions concluded between two Member States or between one Member State and a non-member country.

34 In that respect, with regard to a cultural agreement concluded between two Member States which reserved entitlement to study scholarships exclusively to nationals of those two States, the Court has ruled that Article 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) obliged the authorities of those Member States to extend the benefit of the training bursaries provided for by that bilateral agreement to workers residing and carrying out a professional activity within their territory, but having the nationality of a third Member State (see, to that effect, judgment of 27 September 1988, *Matteucci*, 235/87, EU:C:1988:460, paragraphs 16 and 23).

35 The Court has ruled that, if the application of a provision of Community law was liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement fell outside the field of application of the Treaty, every Member State was under a duty to facilitate application of that provision and, to that end, to assist every other Member State which was under an obligation under Community law (judgment of 27 September 1988, *Matteucci*, 235/87, EU:C:1988:460, paragraph 19).

36 Thus, in paragraph 23 of the judgment of 27 September 1988, *Matteucci* (235/87, EU:C:1988:460), the Court held that a bilateral agreement which reserved entitlement to the study scholarships exclusively to nationals of the two Member States which were party to that agreement could not obstruct the application of the principle of equality of treatment between national workers and Community workers established in the territory of one of those two Member States.

37 Furthermore, with regard to a bilateral international convention concluded between a Member State and a non-member country for the avoidance of double taxation, the Court has pointed out that, although direct taxation is a matter falling within the competence of the Member States alone, the latter could not disregard Community rules (see, to that effect, judgment of 21 September 1999, *Saint-Gobain ZN*, C?307/97, EU:C:1999:438, paragraphs 57 to 59). The Court has accordingly ruled that the national treatment principle requires the Member State which is party to such a convention to grant to permanent establishments of companies resident in another Member State the advantages provided for by the convention on the same conditions as those which apply to companies resident in the Member State that is party to the convention (judgment

of 21 September 1999, *Saint-Gobain ZN*, C?307/97, EU:C:1999:438, paragraph 59).

38 The Court recalled that case-law in the judgment of 15 January 2002, *Gottardo*, (C?55/00, EU:C:2002:16, paragraph 32), which concerned the entitlement of a French national, who had worked in Italy, Switzerland and France and who did not have sufficient rights to receive an old-age pension in Italy, to the aggregation of the periods of insurance which she had completed in Switzerland and in Italy, as provided for in the bilateral convention concluded between the Italian Republic and the Swiss Confederation on social security matters for nationals of those two countries. In the case which gave rise to that judgment, the national court sought to ascertain whether the competent Italian social security authorities were required, in accordance with their obligations under, in particular, Article 39 EC (now Article 45 TFEU), to extend, to workers who were nationals of Member States other than the Italian Republic, entitlement to have periods of insurance completed in Switzerland taken into account for the acquisition of the right to Italian old-age allowances.

39 In those circumstances, the Court pointed out that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC (now Article 351 TFEU), to comply with the obligations that EU law imposes on them (judgments of 15 January 2002, *Gottardo*, C?55/00, EU:C:2002:16, paragraph 33, and of 21 January 2010, *Commission* v *Germany*, C?546/07, EU:C:2010:25, paragraph 42). The fact that non-member countries, for their part, are not obliged to comply with any EU-law obligation is irrelevant in that regard.

40 Consequently, when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so (judgment of 15 January 2002, *Gottardo*, C?55/00, EU:C:2002:16, paragraph 34).

41 In that regard, the Court has already held that disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention (see, to that effect, judgments of 21 September 1999, *Saint-Gobain ZN*, C?307/97, EU:C:1999:438, paragraph 60, and of 15 January 2002, *Gottardo*, C?55/00, EU:C:2002:16, paragraph 36).

42 In the judgment of 15 January 2002, *Gottardo*, (C?55/00, EU:C:2002:16, paragraph 37), the Court found, however, that the Italian Government had failed to establish that the obligations which EU law imposed on it would compromise those resulting from the commitments into which the Italian Republic had entered vis-à-vis the Swiss Confederation. In the case which gave rise to that judgment, the Court found that the extension, to workers who are nationals of Member States other than the Italian Republic, of the benefit of having insurance periods which they completed in Switzerland taken into account for the acquisition of entitlement to Italian old-age benefits, applied unilaterally by the Italian Republic, would in no way compromise the rights which the Swiss Confederation derived from the convention relating to social security concluded between the Italian Republic and the Swiss Confederation and would not impose any new obligations on the Swiss Confederation.

43 Furthermore, in that judgment, the Court pointed out that the arguments put forward by the

competent national authority and by the Italian Government as justification for their refusal to allow the aggregation of periods of insurance completed by the interested party to be taken into account, arguments which related to the possible increase in their financial burdens and administrative difficulties associated with collaborating with the competent Swiss authorities, could not justify the Italian Republic's failure to comply with its Treaty obligations.

44 In the present case, EU, a Portuguese national, works in Luxembourg whilst living in France. It thus appears that his situation comes within the scope of Article 45 TFEU, which requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work, and that both he and his child are covered by Regulation No 883/2004, Article 4 of which provides that persons to whom that regulation applies are to enjoy the same benefits under the legislation of any Member State as the nationals thereof.

45 As is apparent from the request for a preliminary ruling, the Luxembourg authorities took the view that, in the light of the circumstances of the case in the main proceedings, EU's child is not entitled to family allowances, either on her own account, or as a member of her mother's family or of her father's family.

46 In the light of the case-law cited in paragraphs 38 to 42 of the present order, it does not appear that the obligation for the Grand-Duchy of Luxembourg to extend to a migrant worker, in a situation such as that at issue in the main proceedings, the advantages which its own nationals derive from that convention is such as to call into question the balance and reciprocity of that convention, since that extension would not compromise the obligations resulting from the commitments entered into by the Grand-Duchy of Luxembourg vis-à-vis the United States of Brazil (now the Federative Republic of Brazil). The extension, to the nationals of other Member States working in Luxembourg, of the benefit of family allowances for their children not living in that territory, applied unilaterally by the Grand-Duchy of Luxembourg, is not such as to compromise the rights of the Federative Republic of Brazil under the Social Security Convention of 1965 and also does not impose any new obligations on that non-member country.

47 Furthermore, the argument relating to the heavy financial and administrative burdens which the relevant authority would face if it had to extend to nationals of other Member States the advantages granted to its own nationals cannot, as such, provide objective justification for that authority's refusal to extend those advantages.

48 In that regard, the Court has repeatedly held that reasoning based on an increase in financial burdens and possible administrative difficulties cannot, in any event, justify a failure to comply with obligations arising out of the prohibition of discrimination based on nationality, set out in Article 45 TFEU (judgments of 15 January 2002, *Gottardo*, C?55/00, EU:C:2002:16, paragraph 38; of 16 September 2004, *Merida*, C?400/02, EU:C:2004:537, paragraph 30; of 28 June 2012, *Erny*, C?172/11, EU:C:2012:399, paragraph 48, and of 19 June 2014, *Specht and Others*, C?501/12 to C?506/12, C?540/12 and C?541/12, EU:C:2014:2005, paragraph 77).

49 It follows that, in a situation such as that at issue in the main proceedings, in which the child of a migrant worker, the latter being a national of a Member State, who lives with her mother in a non-member country is not entitled to family allowances, either on her own account, or as a member of her mother's family or of her father's family, the Member State of employment of that worker is in principle required, in accordance with its obligations under Article 45 TFEU and Article 4 of Regulation No 883/2004, to grant that child the right to the family allowances which would be granted to its own nationals and residents when identical conditions for granting those allowances exist under a bilateral international convention concluded with that non-member country, unless that Member State can put forward an objective justification for refusing to do so. Disturbing the

balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may constitute an objective justification for that Member State to refuse to extend to nationals of other Member States the advantages which its own nationals derive from that convention.

50 Having regard to the foregoing considerations, the answer to the questions referred is that Article 45 TFEU, read in conjunction with Article 4 of Regulation No 883/2004, must be interpreted as precluding the refusal by the competent authorities of one Member State to pay to a national of a second Member State, who works in the first Member State without living there, family allowances for his child living in a non-member country with her mother when, under identical conditions for the grant of those benefits, those competent authorities recognise the entitlement of their own nationals and residents to family benefits pursuant to a bilateral international convention concluded between the first Member State and that non-member country, unless those authorities can put forward an objective justification for refusing to do so.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

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

Article 45 TFEU, read in conjunction with Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, must be interpreted as precluding the refusal by the competent authorities of one Member State to pay to a national of a second Member State, who works in the first Member State without living there, family allowances for his child living in a non-member country with her mother when, under identical conditions for the grant of those benefits, those competent authorities recognise the entitlement of their own nationals and residents to family benefits pursuant to a bilateral international convention concluded between the first Member State and that non-member country, unless those authorities can put forward an objective justification for refusing to do so.

[Signatures]

* Language of the case: French.