Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

16 November 2023 *

(Reference for a preliminary ruling – Officials of the European Union – Staff Regulations of Officials of the European Union – Compulsory affiliation to the social security scheme of the EU institutions – Retired official of the European Union who pursues a professional activity as a self-employed person – Liability for social security contributions under the scheme of the Member State in which that activity is carried out)

In Case C-415/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium), made by decision of 9 June 2022, received at the Court on 20 June 2022, in the proceedings

JD

v

Acerta – Caisse d'assurances sociales ASBL,

Institut national d'assurances sociales pour travailleurs indépendants (Inasti),

Belgian State,

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– JD, by J. Buekenhoudt, lawyer,

* Language of the case: French.

– the Belgian Government, by S. Baeyens, C. Pochet and L. Van den Broeck, acting as Agents, and by S. Rodrigues and A. Tymen, lawyers,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the French Government, by R. Bénard and A. Daniel, acting as Agents,

– the European Commission, by T.S. Bohr and D. Martin, 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 the principle of a single social security scheme, as set out in 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, as 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'), and, subsequently, in 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 JD, a retired official of the European Commission, on the one hand, and Acerta – Caisse d'assurances sociales ASBL, the Institut national d'assurances sociales pour travailleurs indépendants (Inasti) and the Belgian State, on the other hand, concerning the compulsory affiliation of JD to the Belgian social security scheme in the years 2007 to 2020.

Legal context

European Union law

The Protocol

3 Article 12 of Protocol (No 7) on the privileges and immunities of the European Union (OJ 2010 C 83, p. 266) ('the Protocol') states as follows:

'Officials and other servants of the Union shall be liable to a tax for the benefit of the Union on salaries, wages and emoluments paid to them by the Union, in accordance with the conditions and procedure laid down by the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and after consultation of the institutions concerned.

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Union.'

4 Article 14 of the Protocol provides:

'The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and after consultation of the institutions concerned, shall lay down the scheme of social security benefits for officials and other servants of the Union.'

The Staff Regulations

5 Article 72(1), (1a), (2) and (2a) of the Staff Regulations of Officials of the European Union, in the version applicable to the main proceedings, ('the Staff Regulations'), provides:

'1. An official … [is] insured against sickness up to 80% of the expenditure incurred subject to rules drawn up by agreement between the appointing authorities of the institutions [of the Union] after consulting the Staff Regulations Committee …

…

1a. An official whose service terminates and who provides evidence that he is not in gainful employment may, not later than one month following that in which his service terminates apply to continue, for a maximum of six months after termination of service, to be insured against sickness as provided in paragraph 1. The contribution referred to in the previous paragraph shall be calculated by reference to the last basic salary received by the official, half the contribution being borne by him.

…

2. An official who has remained in the service of the Union until pensionable age or who is in receipt of an invalidity allowance shall be entitled to the benefits provided for in paragraph 1 after he has left the service. The amount of contribution shall be calculated by reference to the amount of pension or allowance.

…

2a. The following shall likewise be entitled to the benefits provided for in paragraph 1, on condition that they are not in gainful employment:

(i) former officials entitled to retirement pensions who leave the service of the Union before reaching pensionable age,

(ii) persons entitled to a survivor's pension as a result of the death of a former official who left the service of the Union before reaching pensionable age.

…'

The Joint Rules

6 For the purposes of defining the conditions for application of Article 72 of the Staff Regulations, the institutions adopted Joint Rules on sickness insurance for officials of the European Union ('the Joint Rules').

7 Article 1 of the Joint Rules, in accordance with Article 72 of the Staff Regulations, establishes a Sickness Insurance Scheme common to the institutions of the European Communities ('the JSIS').

8 Article 2 of the Joint Rules provides:

'1. The following shall be members of this Scheme:

– permanent officials,

– temporary agents,

…

3. The following shall also be members of this Scheme:

– former officials and temporary staff in receipt of a retirement pension,

– former contract agents in receipt of a retirement pension provided that they have been employed for more than three years as contract agents,

– persons in receipt of an invalidity pension or disability allowance,

…'

9 Article 4 of the Joint Rules reads as follows:

'Where permanent officials, temporary staff or contract agents are employed in a country in which they are required by the law of that country to join a compulsory scheme of sickness insurance, the contributions due under that scheme shall be paid in full from the budget of the institution to which the persons concerned belong. In this event, Article 22 shall apply.'

10 Article 22 of the Joint Rules states:

'1. Where a member or a person covered by his insurance may claim reimbursement of expenses incurred under any other legal or statutory sickness insurance, the member shall:

(a) notify the office responsible for settling claims;

(b) in the first instance apply, or have the person concerned apply, for reimbursement under the other scheme;

However, if obliged to pay into two schemes, members of this Scheme may choose the scheme to which they apply for reimbursement of the benefits they have received in the knowledge that the Community Scheme will be available as a top-up scheme in cases where it does not act as the primary scheme;

(c) attach to any application for reimbursement made under this Scheme a detailed original statement, together with supporting documents, of reimbursements which the member or the person covered by his insurance has obtained under the other scheme.

2. The Community Scheme shall act as a top-up scheme for reimbursement of benefits provided the other scheme has previously reimbursed the benefits covered by it.

If a benefit is not covered by the primary scheme but is covered by the Community Scheme the latter shall act as the primary scheme.'

Regulations No 1408/71 and No 883/2004

11 In accordance with Article 2(1) of Regulation No 1408/71, the 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.'

12 Article 13(1) of that regulation provides that 'persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.'

13 Regulation No 1408/71 was repealed from 1 May 2010, which is the date of application of Regulation No 883/2004.

14 However, the wording of Article 2(1) and Article 13(1) of Regulation No 1408/71 is, in essence, identical to that of Article 2(1) and Article 11(1) of Regulation No 883/2004, respectively.

Belgian law

15 Article 1 of arrêté royal n° 38, du 27 juillet 1967, organisant le statut social des travailleurs indépendants (Royal Decree No 38 of 27 July 1967 on the application of the social security scheme for self-employed persons) (*Moniteur Belge*, 29 July 1967, p. 8071), in the version applicable to the main proceedings ('Royal Decree No 38/1967'), provides:

'The present decree establishes the social security scheme for self-employed persons and spouses.

That social security scheme extends to:

…

2° retirement and survivor benefits;

…'

16 Article 2 of that decree provides:

'The following are subject to the present decree and must therefore comply with the obligations imposed by it: self-employed persons and spouses.'

17 Article 3(1) of that decree provides that:

‘A self-employed person is any natural person who pursues in Belgium an occupational activity in respect of which he is not bound by a contract … of employment or by a set of standard terms and conditions.

Until proven otherwise, any person who pursues in Belgium an occupational activity liable to produce income covered by … shall be presumed to fall within the qualifying conditions referred to in the preceding paragraph …’

18 According to Article 13(1) of Royal Decree No 38/1967:

‘From the quarter in which he or she reaches statutory pensionable age or obtains effective payment of an early retirement pension as a self-employed person or as an employed person, the taxable person is not liable to pay any contributions if his professional income as a self-employed person, acquired during the contribution year referred to in Article 11(2), does not reach EUR 811.20 per month.

Where that income reaches at least EUR 811.20, the person shall be liable to pay the following annual contributions …’

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

19 JD, born on 4 October 1940, of British nationality, was an official at the Commission in Brussels (Belgium) until 1 March 2006, when he retired.

20 After that date, he worked as a consultant on a self-employed basis.

21 As a result of those activities, Inasti made him subject, on a compulsory basis and from 12 February 2007, pursuant to Article 13 of Royal Decree No 38/1967, to the social security scheme for self-employed persons.

22 After unsuccessful exchanges of correspondence with Acerta, on 15 January 2021 JD brought an action before the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium), the referring court, seeking, in particular, reimbursement of the contributions he believes to have been wrongly paid, amounting to EUR 50 732.50. First, he argues that the principle of a single social security scheme precludes his compulsory affiliation to the Belgian social security scheme. Secondly, as he does not derive any social security benefits in return for that affiliation, he has been making contributions at an outright loss since 2007.

23 The defendants in the main proceedings submit, in essence, that if a retired EU official who is self-employed in Belgium were not liable to pay any social security contributions to the Belgian social security scheme, the equal treatment of EU officials and any other official, self-employed person or employee who pursues an activity in Belgium might be undermined, even though, under national legislation, social security contributions are regarded as ‘solidarity’ contributions.

24 In addition, they point out that the legal position of EU officials with regard to their social security obligations comes within the scope of EU law by reason of their employment by the European Union, so that the principle of a single social security scheme only applies where there is an employment relationship with the European Union. Since, in the present case, there has been no

such employment relationship with the European Union since 2007, it would be appropriate, in accordance with Article 11(3)(a) of Regulation No 883/2004, to apply the legislation of the place where the activity concerned is pursued, that is to say, Belgian legislation.

25 The referring court states that the concept of a 'member' of the JSIS must be given a broad meaning and must cover, at the very least, staff who remain in the service of the European Union until pensionable age.

26 In those circumstances the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking)) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the principle of EU law based on a single social security scheme applicable to workers, whether employed or self-employed, active or retired, preclude a Member State of residence from requiring, as in the present case, a retired official of the European Commission, who pursues an activity as a self-employed person, to be subject to its social security scheme and the payment of purely 'solidarity' social security contributions, where the retired official is subject to the compulsory social security scheme of the European Union and does not derive any benefits, be they contributory or non-contributory, from the national scheme to which he or she is subject by force?'

Consideration of the question referred

27 As a preliminary point, it should be noted that, even if the referring court, in its question, referred solely to the principle of a single social security scheme, such a circumstance does not prevent the Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in that regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of 28 June 2018, *Crespo Rey*, C-2/17, EU:C:2018:511, paragraph 41 and the case-law cited).

28 Accordingly, the question referred should be understood as meaning that the referring court is asking whether Article 14 of the Protocol and the provisions of the Staff Regulations, in particular Article 72 thereof, must be interpreted as precluding the compulsory affiliation, under the scheme of a Member State, to the social security scheme of that State of an EU official who has remained in the service of an institution of the European Union until pensionable age and who pursues a self-employed professional activity in the territory of that Member State.

29 In that regard, it should be recalled that, with regard to the principle of a single social security scheme, as expressed in Article 13 of Regulation 1408/71 and repeated in Article 11 of Regulation 883/2004, those regulations have established a system of coordination concerning, inter alia, the determination of the legislation applicable to employed and self-employed persons who make use, under various circumstances, of their right to freedom of movement. The completeness of that system of conflict rules has the effect of divesting the legislature of each Member State of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (see, to that effect, judgments of

26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraphs 34 to 35 and the case-law cited, and of 15 September 2022, *Rechtsanwaltskammer Wien*, C-58/21, EU:C:2022:691, paragraphs 43 and 49).

30 Thus, Article 13(1) of Regulation No 1408/71 and Article 11(1) of Regulation No 884/2004 expressly provide that the persons to whom those regulations apply are subject only to the legislation of a single Member State, which therefore excludes, in principle, any possibility of several national schemes being applied concurrently for the same period.

31 The principle of a single social security scheme set out in Regulation No 1408/71 and Regulation No 883/2004 does not apply to EU officials, in so far as EU officials are not subject to national legislation on social security, as referred to in Article 2(1) of Regulation No 1408/71 and in the same article of Regulation No 883/2004, which defines the persons covered by those regulations. EU officials therefore cannot be characterised as 'workers' within the meaning of those provisions (see, to that effect, judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 35 and the case-law cited).

32 The European Union alone, and not the Member States, has competence to establish the rules applicable to EU officials in respect of their social security obligations (judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 44).

33 The joint social security scheme of the EU institutions was laid down, pursuant to Article 14 of the Protocol, by the Parliament and the Council acting by means of regulations establishing the Staff Regulations (see, to that effect, judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 36).

34 First, Article 14 of the Protocol must be regarded as meaning that the compulsory affiliation of EU officials to a national social security scheme and the requirement for those officials to contribute to the funding of such a scheme are outside the jurisdiction of the Member States (see, to that effect, judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraphs 40 and 41).

35 Secondly, the Staff Regulations, which have all the characteristics listed in Article 288 TFEU, is binding in its entirety and is directly applicable in all Member States. It follows that all Member States are also bound by the Staff Regulations (see, to that effect, judgments of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 42, and of 4 February 2021, *Ministre de la Transition écologique et solidaire et Ministre de l'Action et des Comptes publics*, C-903/19, EU:C:2021:95, paragraph 36).

36 In that context, it should be noted that, under Article 72(1) of the Staff Regulations, all officials and temporary staff in the service of an EU institution are insured against sickness.

37 In accordance with Article 72(2) of the Staff Regulations, an official who has remained in the service of the European Union until pensionable age or who is in receipt of an invalidity allowance is to be entitled to the same cover. The amount of contribution is to be calculated by reference to the amount of pension or allowance.

38 Article 72(2a) of the Staff Regulations states that officials entitled to retirement pensions who leave the service of the Union before reaching pensionable age are still covered, on condition, however, that they are not in gainful employment.

39 Similarly, it is apparent from Article 72(1a) of the Staff Regulations, that an official whose service terminates and who provides evidence that he is not in gainful employment may apply to continue, for six months, to be insured against sickness.

40 It follows from those provisions that an official whose employment relationship with the European Union has lasted until pensionable age continues to be covered by the EU social security scheme, unlike an official who has left the institutions before reaching pensionable age to take up gainful employment in a Member State. The latter is no longer covered by the EU social security scheme and the applicable social security scheme is determined in accordance with the provisions of Regulation No 883/2004.

41 In the present case, it is not disputed that the applicant in the main proceedings worked for the Commission until pensionable age, so that, in accordance with Article 72(2) of the Staff Regulations, he remained a member of the JSIS notwithstanding the fact that, once retired, he pursued gainful employment in a Member State.

42 However, national legislation of a Member State which subjects the income of an EU official who has remained in the service of an institution until pensionable age and who pursues a self-employed professional activity in that Member State to the social security scheme of that State infringes the exclusive competence of the European Union under Article 14 of the Protocol and the relevant provisions of the Staff Regulations, to determine the rules applicable to EU officials as regards their social security obligations.

43 Although Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe EU law, including the provisions of the Protocol and the Staff Regulations which relate to the social security rules governing the legal position of EU officials, both during their service with an institution and after pensionable age (see, to that effect, judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraphs 34, 38 and 39 and the case-law cited).

44 That interpretation is not called into question by any of the arguments put forward by JD or the interested parties, within the meaning of Article 23 of the Statute of the Court of Justice of the European Union, having submitted written observations.

45 First, the argument that the principle of a single social security scheme, as clarified by the judgment of 26 February 2015, *de Ruyter* (C-623/13, EU:C:2015:123), is linked to the condition of the existence of an employment relationship with the European Union can be dismissed in so far as it is apparent from paragraphs 37 to 40 of this judgment that it is precisely because of the employment relationship with an EU institution until pensionable age that the official continues to be covered by the JSIS, pursuant to Article 72(2) of the Staff Regulations.

46 Secondly, the fact that officials of the EU whether active or retired, are covered by the JSIS is not able to constitute a discriminatory situation in relation to other workers of the Member State concerned, in respect of whom Regulation No 883/2004 determines the applicable legislation as being that of the Member State in which the person concerned pursues his or her professional activity. Even supposing that EU law could have the effect of placing an EU official in an allegedly more advantageous situation, such a situation would not, however, discriminate against resident workers, in that EU officials are not in a situation comparable to that of such workers.

47 As regards the fact that the national legislation classifies the contributions at issue in the main proceedings as 'pure solidarity', it should be pointed out that the Court has repeatedly held, first, that the fact that a levy is categorised as a 'tax' under national legislation does not mean that that same levy cannot be regarded as covered by the rule that there should be no overlapping of applicable social security legislation, provided that it is a social contribution (see, to that effect, judgment of 26 October 2016, *Hoogstad*, C-269/15, EU:C:2016:802, paragraph 29 and the case-law cited). Secondly, whether benefits are obtained or not in return is irrelevant for the question of whether the levy in question is covered by the social security scheme (judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 26).

48 Finally, it is important to remember that there is a clear distinction between the social security obligations of EU officials, whether active or retired, and the tax obligations of these officials, who, under Article 12 of the Protocol, are only exempt from national taxes on their salaries, wages and emoluments paid by the European Union. While those salaries, wages and emoluments are subject to EU law alone as regards any liability to tax, the other income of officials remains subject to taxation by the Member States (see, to that effect, judgment of 21 May 2015, *Pazdziej*, C-349/14, EU:C:2015:338, paragraph 15 and the case-law cited).

49 In the light of the foregoing considerations, the answer to the question referred is that Article 14 of the Protocol and the provisions of the Staff Regulations, in particular Article 72 thereof, must be interpreted as precluding the compulsory affiliation, under the legislation of a Member State, to the social security scheme of that State of an EU official who has remained in the service of an EU institution until pensionable age and who pursues a self-employed professional activity in the territory of that Member State.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Seventh Chamber) hereby rules:

Article 14 of Protocol (No 7) on the privileges and immunities of the European Union and the provisions of the Staff Regulations of Officials of the European Union, in particular Article 72 of those regulations, must be interpreted as precluding the compulsory affiliation, under the legislation of a Member State, to the social security scheme of that State of an EU official who has remained in the service of an EU institution until pensionable age and who pursues a self-employed professional activity in the territory of that Member State.

[Signatures]