Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 September 2017*

(Reference for a preliminary ruling — Application of social security schemes — Migrant workers — Determination of the applicable legislation — Regulation (EEC) No 1408/71 — Article 14(2)(b)(i) — Person normally employed in the territory of two or more Member States — Person employed in one Member State and who pursues part of his activities in the Member State of his residence)

In Case C-570/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 30 October 2015, received at the Court on 5 November 2015, in the proceedings

X

v

Staatssecretaris van Finaciën,

THE COURT (Third Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: M. Szpunar,

Registrar: Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 December 2016,

after considering the observations submitted on behalf of:

– X, by A.B. Bongers, belastingadviseur,

– the Netherlands Government, by M. Bulterman and M. Noort, acting as Agents,

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents,

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

– the European Commission, by D. Martin and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2017,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13(2)(a) and Article 14(2)(b)(i) of 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), as amended by Regulation (EC) No 592/2008 of the Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71').

2 The request has been made in the context of proceedings between X and Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) concerning an assessment in respect of income tax and social insurance contributions.

Legal framework

3 Article 13 of Regulation No 1408/71 provides:

'1. Subject to Articles 14c and 14f, 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.

2. Subject to the provisions of 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;

…'

4 Article 14 of that regulation provides:

'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:

…

(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;

…'

5 Article 14a(2) of that regulation is worded as follows:

‘A person normally self-employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State. …’

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

6 During 2009, X, a Netherlands national resident in Belgium, worked for 1 872 hours as an account manager and manager of telecommunication relations for his employer established in the Netherlands.

7 Out of those 1 872 hours of work, he performed 121 hours in Belgium, representing approximately 6.5% of the total number of hours he worked that year. That time comprised 17 hours spent visiting clients and 104 hours during which he worked from home. Those activities were not carried out according to a set pattern and X’s employment contract did not contain any arrangement for working in Belgium.

8 The rest of the work X carried out for his employer in 2009, amounting to 1 751 hours, was performed in the Netherlands, both in the office and during visits to potential clients.

9 The dispute in the main proceedings between X and the Staatssecretaris van Financiën concerns the assessment of income tax and social insurance contributions imposed for the 2009 financial year.

10 The Gerechtshof ’s-Hertogenbosch (Regional Court of Appeal, ’s-Hertogenbosch, Netherlands), in the appeal against the judgment of the Rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant), ruled that the work which X performed in Belgium during 2009 was merely occasional. It held that those activities should not be taken into consideration when determining what social security legislation is applicable and, in accordance with Article 13(2)(a) of Regulation No 1408/71, only Dutch legislation was applicable for the 2009 financial year.

11 X brought an appeal on a point of law against that judgment before the referring court.

12 It is against this background that the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘What standard or standards should be used to assess what legislation is designated by Regulation (EEC) No 1408/71 as applicable in the case of a worker residing in Belgium who performs the bulk of his work for his Dutch employer in the Kingdom of the Netherlands, and in addition performs 6.5 per cent of that work in Belgium in the year in question, at home and with clients, without there being a fixed pattern and without any agreement having been made with his employer with regard to the performance of work in Belgium?’

Consideration of the question referred

13 By its question, the referring court asks, in essence, whether Article 14(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person, such as the one in question in the main proceedings, who is employed by an employer established in the territory of one Member State and who resides in another Member State where he carried out, over the course of the past year, a part of his employment activity amounting to 6.5% of his hours worked, without such an arrangement being agreed with his employer in advance, must be considered to be normally employed in the territory of two Member States, within the meaning of that provision.

14 In this respect, it should be noted that the provisions of Title II of Regulation No 1408/71, which includes Article 14(2), constitute, according to the settled case-law of the Court, a complete and uniform system of conflict rules, the aim of which is to ensure that workers moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent the national legislation of more than one Member State from being applicable and to avoid the attendant complications of such a situation (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 29 and the case-law cited).

15 In order to achieve that aim, Article 13(2)(a) of Regulation No 1408/71 lays down the principle that a person employed in the territory of one Member State is to be subject to the legislation of that State, even if he resides in the territory of another Member State (see, to that effect, judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 30).

16 Nevertheless, that principle is stated to be 'subject to the provisions of Articles 14 to 17' of Regulation No 1408/71. In certain specific situations the unrestricted application of the rule set out in Article 13(2)(a) of that regulation might in fact create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would place obstacles in the way of the freedom of movement of the persons covered by that regulation (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 31).

17 Article 14(2)(b)(i) of Regulation No 1408/71 provides that a person normally employed in the territory of two or more Member States is to be subject to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory.

18 It is apparent from that provision, which derogates from the general rule of connection to the Member State of employment, that its application is conditional on the person in question being normally employed in the territory of two or more Member States.

19 Such a requirement assumes that the person concerned habitually carries out significant activities in the territory of two or more Member States (see, by analogy, judgment of 30 March 2000, *Banks and Others*, C-178/97, EU:C:2000:169, paragraph 25).

20 In that regard, the fact that a person works in a Member State merely occasionally cannot be taken into account for the purposes of application of Article 14(2)(b)(i) of Regulation No 1408/71.

21 In order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the duration of periods of activity and to the nature of the employment as defined in the contractual documents, as well as to the actual work performed, where appropriate (see, to that effect, judgments of 12 July 1973, *Hakenberg*, 13/73, EU:C:1973:92, paragraph 20, and of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 44).

22 As regards assessing the habitual and significant nature of the activities carried out in two or more Member States, it should be noted that, in its judgment of 16 February 1995, *Calle Grenzshop Andresen* (C-425/93, EU:C:1995:37), the Court held that the situation of a worker residing in one Member State and employed by an undertaking with a registered office in another Member State, who, in the course of that employment relationship, regularly, for 10 hours each week, pursues his activity partly in the Member State of his residence, falls under Article 14(2)(b)(i) of Regulation No 1408/71.

23 The Court also held that a person who pursues an activity as a self-employed person as to approximately one half in the territory of the Member State of his residence and one half in the territory of another Member State, is to be deemed to be a person normally self-employed in the territory of two Member States, within the meaning of Article 14a of Regulation No 1408/71 (see, to that effect, judgment of 13 October 1993, *Zinnecker*, C-121/92, EU:C:1993:840, paragraphs 15 to 18).

24 In the present case, it is clear from the order for reference that the employment contract in question in the main proceedings does not provide for X to carry out work in the territory of his Member State of residence. Moreover, out of all of the hours he worked during the year in question, only approximately 6.5% were performed in that Member State, mostly by working from home.

25 In such circumstances, it cannot be considered that a person such as the one in question in the main proceedings habitually carries out significant activities in the territory of his Member State of residence.

26 Such a finding is consistent with the system for regulating conflicts of laws provided for by the provisions in Title II of Regulation No 1408/71.

27 As is clear from Article 13(2)(a) of that regulation, it is necessary to derogate from the general rule of connection to the Member State of employment only in specific situations which demonstrate that another connection is more appropriate.

28 To accept that application of Article 14(2) of Regulation No 1408/71 could be justified in circumstances in which a person, who out of the total hours worked in one year for his employer established in one Member State carried out only 6.5% of those hours in another Member State (that being the State of his residence), without such an arrangement having been agreed with his employer in advance, would be inconsistent with the fact that connection to the Member State of residence is a derogation and would create a risk of the conflict rules contained in Title II of that regulation being circumvented, as the Advocate General noted in point 29 of his Opinion.

29 In view of the foregoing, the answer to the question referred is that Article 14(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person, such as the one in question in the main proceedings, who is employed by an employer established in the territory of one Member State and who resides in another Member State where he carried out, during the past year, a part of his employment activity amounting to 6.5% of his hours worked without such an arrangement having been agreed with his employer in advance, is not to be considered to be normally employed in the territory of two Member States, within the meaning of that provision.

Costs

30 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 (Third Chamber) hereby rules:

Article 14(2)(b)(i) of 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, as amended by Regulation (EC) No 592/2008 of the Parliament and of the Council of 17 June 2008, must be interpreted as meaning that a person, such as the one in question in the main proceedings, who is employed by an employer established in the territory of one Member State and who resides in another Member State where he carried out,

over the course of the past year, a part of his employment activity amounting to 6.5% of his hours worked without such an arrangement having been agreed with his employer in advance, is not to be considered to be normally employed in the territory of two Member States, within the meaning of that provision.

[Signatures]