Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 March 2017[1]

Case C-570/15

X
v
Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Regulation (EEC) No 1408/71 – Social security – Determination of the applicable legislation – Articles 13(2)(a) and 14(2)(b)(i) – Person normally employed in the territory of two Member States – Person employed in one Member State and pursuing a part of his work activity in the Member State of his residence mostly by working from home)

Introduction

1. The present request for a preliminary ruling arises out of proceedings pending before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) between Mr X and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the payment of income tax and social insurance contributions for the year 2009.

2. The referring court seeks guidance from the Court on the interpretation of conflict rules contained in Articles 13 and 14 pertaining to Title II of Regulation (EEC) No 1408/71.[2] In particular, the referring court raises the question whether a person who is employed in one and resides in another Member State, who also pursues a part of his activity for the same employer (approximately 6.5% of the working time) in the Member State of his residence, mostly by working at home, should be considered to be normally employed in the territory of two Member States for the purpose of determining the applicable legislation.

1 Original language: English.

2 Regulation 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) ('Regulation No 1408/71'). Regulation No 1408/71 was repealed and replaced with effect from 1 May 2010 by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1). However, it remains applicable ratione temporis to the main proceedings.

Legal framework

3. Article 1 of Regulation No 1408/71 contains the following definitions of 'employed person and self-employed person':

'(a) employed person and self-employed person mean respectively:

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

4. Article 13 of that regulation 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;'

5. Article 14(2)(b)(i) of that regulation provides:

'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;'

The facts of the main proceedings

6. Mr X is a Dutch national residing in Belgium in the year in question, 2009.

7. During that year he worked as an account manager and manager of telecommunication relations for an employer established in the Netherlands.

8. In 2009 Mr X worked for his employer for 1 872 hours. Of those, he worked 121 hours in Belgium, that is approximately 6.5% of the total number of hours worked. It comprised 17 hours which were spent visiting clients of the employer who are established in Belgium and 104 hours in which he worked from home in Belgium. The latter occurred on a total of 13 days in 2009, for 8 hours at a time.

9. The activities carried out at home consisted of processing e-mails and making and dispatching offers. The activities in Belgium were not carried out according to a set pattern. Mr X worked mainly at home in the weeks following his summer holiday and not in the winter period. Mr X's employment contract did not contain any arrangement for working at home or elsewhere in Belgium.

10. Mr X carried out the rest of his work for the employer (1 751 hours in 2009) in the Netherlands, both in the office and during visits to potential clients established in the Netherlands.

11. The dispute between Mr X and the Staatssecretaris van Financiën (State Secretary for Finance) in the main proceedings concerns the assessment of income tax and social insurance contributions imposed for the year 2009. In particular the dispute focuses on whether Mr X was subject to insurance on a compulsory basis under the Dutch national insurance system and therefore obliged to pay contributions.

12. The Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch, Netherlands), in the appeal against the judgement of the Rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant), ruled that the work which Mr X performed in Belgium in 2009 was merely occasional. The Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) considered in that regard:

(i) that there were no indications that it was the intention of the employer and Mr X that he should perform work regularly in Belgium,

(ii) that the work was usually performed in the Netherlands,

(iii) that the visits to clients in Belgium were only occasional and

(iiii) that with regard to working from home, there was no indication of any agreement between the employer and Mr X in that respect or of a structural pattern.

13. The Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) further held that the occasional work performed by Mr X in Belgian territory should not be taken into consideration when determining what social security legislation is applicable. The Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) therefore came to the conclusion that Mr X is normally employed in the territory of one Member State, the Netherlands, so that only Dutch legislation is applicable in accordance with Article 13(2)(a) of Regulation No 1408/71.

14. Mr X brought an appeal on a point of law against that judgement before the referring court.

15. The referring court observes that the appeal on a point of law raises the question of which provision of the Regulation No 1408/71 designates the legislation applicable to the interested party. On the one hand, if the activities pursued by Mr X in Belgium were disregarded, the general conflict rule contained in Article 13(2)(a) of that regulation would apply, pointing to the applicable legislation of the Member State of employment. On the other hand, if those activities did have to be involved in the assessment, then the application of Article 13(2)(a) of that regulation would result in the applicable legislation changing from that of the Netherlands to that of Belgium every time that the location of the actual work performed by Mr X switched from the Netherlands to Belgium, and vice versa. Alternatively, it could be considered that Mr X was normally employed in the territory of two Member States, the Netherlands and Belgium and that therefore, on the basis of the special rule in Article 14(2)(b)(i) of Regulation No 1408/71, only the legislation of the Member State of his residence applies to him.

The question referred for a preliminary ruling and the proceedings before the Court of Justice

16. It is in the above circumstances 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 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 Netherlands, and in addition performs 6.5% 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?'

17. The order for reference of 30 October 2015 was received at the Court Registry on 5 November 2015. Written observations were submitted by the Dutch, the Belgian and the Czech Governments as well as the European Commission. Mr X, the Dutch Government and the Commission presented oral argument at the hearing on 14 December 2016.

Analysis

18. The referring court is essentially asking whether a person employed in one and residing in another Member State, who, during the year in question, exercised a small part of his activities for the same employer (approximately 6.5 % of the working time) in the Member State of his residence, mostly by working at home, must be considered as being normally employed exclusively in the first Member State or in both Member States, for the purposes of applying Articles 13 and 14 of Regulation No 1408/71.

19. The referring court thereby seeks to determine what legislation is designated as applicable to such a person by the provisions contained in Title II of that regulation.

20. The positions of the interested parties differ on this issue.

21. At the hearing, Mr X maintained that he should be considered as normally employed in two Member States and therefore as being subject to the legislation of the Member State of his residence, in accordance with Article 14(2)(b) of Regulation No 1408/71. He argued that he is entitled to work at home, and that his activities at home, such as replying to emails and contacting clients by telephone, pertain to his main working tasks. He further contended that those activities have to be taken into account when determining the applicable legislation.

22. On the other hand, the intervening Member States and the Commission agree that Regulation No 1408/71 should be interpreted as meaning that a worker resident in Belgium, who exercises the vast majority of his activities for his Dutch employer on the territory of the Netherlands and who, moreover, exercised 6.5% of these activities during the year in question in Belgium, should be considered as only employed in the territory of the Netherlands, and subject to the Dutch social security legislation, in accordance with the lex loci laboris conflict rule as provided in Article 13(2)(a) of that regulation.

23. The Court has consistently held that provisions of Title II of Regulation No 1408/71, of which Articles 13 and 14 form part, constitute a complete and uniform system of conflict rules, the aim of which is to ensure that workers moving within the Union are to be subject to the social security scheme of only one Member State, in order to prevent more than one legislative system from being

applicable and to avoid the complications which may result from that situation. [3]

24. In the present case, in order to determine whether the situation at hand falls under the general conflict rule contained in Article 13(2)(a) of Regulation No 1408/71 (*lex loci laboris*) or under the special rule of Article 14(2)(b)(i) (*lex domicilii*), it is necessary to ascertain whether Mr X's activity in Belgium should be taken into account for the purposes of applying those provisions.

25. If that activity were taken into account, Mr X must be considered as normally employed in the territory of two Member States in the sense of Article 14(2)(b)(i) of Regulation No 1408/71. Otherwise, the general conflict rule contained in Article 13(2)(a) of that regulation applies.

26. I observe that the circumstance that Mr X works for one employer does in no way exclude the application of Article 14(2)(b)(i) of Regulation No 1408/71. As the Court has already held in *Calle Grenzshop Andresen*, that provision is also applicable where the person concerned pursues his activities on the territory of two or more Member States for one and the same undertaking. [4]

27. Moreover, there appears to be no doubt in the present case that Mr X's activity in Belgium does not fall within the meaning of a posting in the sense of Article 14(l)(a) of Regulation No 1408/71, since he pursues his activities in Belgium without any time limitation, by partly exercising his main work duties at home with the tacit agreement of his employer.

28. The hypothesis of Article 14(2)(b)(i) envisages the situation where the person concerned is 'normally' employed in the territory of two or more Member States and also pursues his activity 'partly' in the territory of the Member State of his residence.

29. The terms used by that provision imply that employment activity exercised in the Member State of employee's residence must be of a certain minimum extent. Otherwise, even the pursuit of negligible or occasional activity could activate the legal consequences of Article 14(2)(b)(i). The application of the conflict rules contained in Title II of the Regulation No 1408/71would thus be exposed to the risk of circumvention. [5]

30. As the Court has already held in relation to self-employed activity, the word 'normally' implies that the person concerned habitually carries out 'significant' activities in the territory of that Member State. [6]

31. This interpretation is not contradicted by the judgment in *Calle Grenzshop Andresen*, where the Court has held that the situation of a Danish worker, residing in Denmark and employed in Germany, who regularly for several hours each week pursues his activity partly in Denmark, falls under Article 14(2)(b)(i) of Regulation No 1408/71. [7] The person concerned worked as a manager in a business located in Germany, near the German-Danish border, and also worked for his employer for about ten hours each week in Denmark, by carrying out coordinating and supervisory tasks. It follows clearly from the analysis provided by Advocate General Lenz in that case that that activity performed in the Member State of residence could not be considered as insignificant. [8]

3 See, in particular, judgment of 24 March 1994, *Van Poucke* (C-71/93, EU:C:1994:120, paragraph 22).

4 Judgment of 16 February 1995 (C-425/93, EU:C:1995:37, paragraph 13).

5 I note that Article 13(1)(a) of Regulation No 883/2004 modifies the conflict rule previously contained in Article 14(2)(b)(i) of Regulation No 1408/71 by introducing the requirement for a 'substantial' part of a person's activity to be pursued in the Member State of residence.

6 Judgment of 30 March 2000, *Banks and Others* (C-178/97, EU:C:2000:169, paragraph 25 and the case law quoted).

7 Judgment of 16 February 1995 (C-425/93, EU:C:1995:37).

8 Judgment of 16 February 1995, Calle Grenzshop Andresen (C-425/93, EU:C:1995:37, paragraph 15) and Opinion of Advocate General Lenz in *Calle Grenzshop Andresen* (C-425/93, EU:C:1995:12, points 28-33).

32. In *Format Urządzenia i Montaże Przemysłowe*, the Court held that in determining whether a person must be considered as 'normally' employed in the territory of two or more Member States, it is necessary to have regard, in particular, to the nature of the work as defined in the contractual documents in order to determine whether the foreseeable activities amount to employed activities covering, on more than a merely one-off basis, the territory of several Member States, and also to consider the actual work performed. [9]

33. It follows from this case-law that in order to determine whether a person is 'normally' employed in the territory of another Member State for the purposes of applying Articles 13 and 14 of Regulation No 1408/71, one should take into account the extent and the importance of a given activity, on the basis of the contractual documents as well as the actual work performed by the employee.

34. In the present case, it is apparent from the order for reference that the working time attributable to the activities of Mr X in the Member State of his residence amounts to 6.5% of the overall working time during the relevant period. The extent of the work actually performed in Belgium constitutes, in my opinion, a strong indication that those activities are insignificant in relation to the overall contractual relationship or, as the Commission proposes, that they are exercised only 'occasionally', as compared with the overwhelming part of his employee duties.

35. The duration of the work is not, in my view, the only decisive element. It is also necessary to consider other circumstances, such as the nature of activities and the circumstances in which they are performed. [10]

36. In the present case, Mr X's activities in Belgium comprised occasional visits to clients and, predominantly, working from home, without any explicit agreement with the employer or any working pattern.

37. I observe that it is one of the advantages – or, for some people, a curse – of the digital economy, that an employee may be asked or allowed to accomplish a part of his office tasks while away from the office, possibly, by working from home.

38. The particularity of such a working arrangement lies in the fact that it potentially undermines the concept of a particular place of employment, as a relevant factor for determining the Member State which has the closest link to the employment relationship. A person can do telework on her computer or telephone at home or while travelling and such mode of working can amount to a significant part of employment activity. The Court will have in the future to decide how this circumstance should be taken into account for the purposes of determining the applicable social security legislation.

39. This consideration does not arise in the present case, since there are other indicators – the small amount of work and the lack of any structural pattern reflected in contractual documents – which also point to the marginal nature of Mr X's activities in his Member State of residence.

40. In a situation such as that at issue in the main proceedings, where the working from home is not explicitly reflected in contractual documents, does not constitute a structural pattern and moreover amounts to a relatively small percentage of the overall working time, it seems to me clearly inappropriate to rely on that circumstance for the purposes of applying Articles 13 and 14 of Regulation No 1408/71.

9 Judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraphs 44-45).

10 See, to that effect, judgment of 12 July 1973, *Hakenberg* (13/73, EU:C:1973:92, paragraph 20) and Opinion of Advocate General Lenz in *Calle Grenzshop Andresen* (C-425/93, EU:C:1995:12, point 32).

41. I therefore consider that, in circumstances such as those in the main proceedings, the activities exercised by an employee for the same employer in another Member State, amounting to approximately 6.5% of the working time and, moreover, accomplished mostly by working at home, must be regarded as marginal and must not be taken into account for the purposes of applying Articles 13 and 14 of Regulation No 1408/71. The person in such a situation must therefore be regarded as normally employed in one Member State only and subject to the legislation determined by the general conflict rule contained in Article 13(2)(a) of that regulation.

42. As a subsidiary consideration, I observe that that conclusion seems to be corroborated by the concept of 'marginal activity' introduced in Article 14(5)(b) of Regulation No 987/2009[11] and explained in the Practical guide which was prepared, under the auspices of the Commission, by the Administrative Commission for the Coordination of Social Security Systems, in order to assist the national authorities applying the conflict rules of Regulation No 883/2004.[12]

43. It follows from the explanations given in the Practical guide that 'marginal' activities are not to be taken into account for the purposes of the conflict rules concerning a person who is employed or self-employed in two or more Member States. A person pursuing marginal activities in another Member State cannot be regarded as 'normally' pursuing an activity in two or more Member States. Marginal activities are further defined as activities that are permanent but insignificant in terms of time and economic return, suggesting, as an indicator, that activities accounting for less than 5% of the worker's regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal. The nature of activities, for instance, the circumstance that they are not independent or are performed from home, can also indicate that they are marginal.

Conclusion

44. In the light of all the foregoing considerations, I propose that the Court give the following answer to the question referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands):

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, must be interpreted as meaning that, in circumstances such as those in the main proceedings, a person employed in one Member State and residing in another Member State, who, during the year in question, exercised a small part of his activities for the same employer – approximately 6.5% of the working time – in the latter Member State, mostly by working at home, must be considered as being employed exclusively in the former Member State for the purposes of applying Articles 13 and 14 of that regulation.

11 Article 14(5)(b) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1), as amended by Regulation (EU) No 465/2012 (OJ 2012 L 149, p. 4) provides: '5b. Marginal activities shall be disregarded for the purposes of determining the applicable legislation under Article 13 of the basic Regulation. …'.

12 Commission Practical guide of December 2013 on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, p. 27.