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Judgment of the Court (Fifth Chamber) of 30 March 2000. - Barry Banks and Others v Theatre royal de la Monnaie. - Reference for a preliminary ruling: Tribunal du travail de Bruxelles - Belgium. - Social security for migrant workers - Determination of the legislation applicable - Scope of the E 101 Certificate. - Case C-178/97.

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Keywords

1. Social security for migrant workers - Work for the purposes of Article 14a(1)(a) of Regulation No 1408/71 - Meaning

(Council Regulation No 1408/71, Art. 14a(1)(a))

2. Social security for migrant workers - Legislation applicable - Self-employed worker going to work in another Member State - E 101 certificate issued by the competent institution of the Member State of origin - Probative value in relation to the competent institution of the other Member State - Limits - Retroactive effect of the certificate - Admissibility

(Council Regulation No 1408/71, Art. 14a(1)(a); Council Regulation No 574/72, Art. 11a)

Summary

1. The term work in Article 14a(1)(a) of Regulation No 1408/71, amended and updated by Regulation No 2001/83, and subsequently by Regulation No 3811/86, which provides that a person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State shall continue to be subject to the legislation of the first Member State, provided the anticipated duration of the work does not exceed 12 months, covers any performance of work, whether in an employed or self-employed capacity.

That interpretation arises, first, from the wording of the provision in question, the word work ordinarily having a general meaning designating without distinction performance of work in either an employed or a self-employed capacity. It is, moreover, confirmed by the circumstances in which

the provision was adopted, the Council having preferred the term work to that of provision of services which had been proposed by the Commission so as to restrict its application exclusively to cases where work is performed in a self-employed capacity in the territory of another Member State.

(see paras 16, 21, 23, 28, operative part 1)

2. So long as it has not been withdrawn or declared invalid, an E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, stating that the self-employed person concerned remains subject to the legislation of his Member State of origin throughout a given period in which he carries out a work assignment in the territory of another Member State, is binding both on the competent institution of the Member State to which a self-employed person goes in order to carry out a work assignment and the person who calls upon the services of that worker.

However, it is incumbent on the competent institution of the Member State which issued that certificate to reconsider whether it was properly issued and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the self-employed person carries out a work assignment expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Article 14a(1)(a) of Regulation No 1408/71.

There is nothing to prevent the E 101 certificate from producing retroactive effects, according to the circumstances.

(see paras 43, 48, 53-54, 57, operative part 2-3)

Parties

In Case C-178/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal du Travail de Bruxelles, Belgium, for a preliminary ruling in the proceedings pending before that court between

Barry Banks and Others

and

Théâtre Royal de la Monnaie

on the interpretation of Article 14a(1)(a) and Article 14c 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, and of Articles 11a and 12a(7) of Council Regulation (EEC) No 574/72 of 21 March 1972, fixing the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), and subsequently by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet (Rapporteur) and P. Jann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Banks and others, by M.J.S. Renouf, Solicitor, and B. Blanpain, of the Brussels Bar,

- the Théâtre Royal de la Monnaie, by S. Capiau, of the Brussels Bar,

- the German Government, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same ministry, acting as Agents,

- the French Government, by M. Perrin de Brichambaut, Director of Legal Affairs in the Ministry of Foreign Affairs, and C. Chavance, Secretary of Foreign Affairs in the same Directorate, acting as Agents,

- the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the United Kingdom Government, by J.E. Collins, of the Treasury Solicitor's Department, acting as Agent,

- the Commission of the European Communities, by M. Wolfcarius, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Banks and others, represented by M.J.S. Renouf and B. Blanpain; of the Théâtre Royal de la Monnaie, represented by S. Capiau; of the German Government, represented by C.-D. Quassowski; of the French Government, represented by C. Chavance; of the Irish Government, represented by A. O'Caoimh SC; of the Netherlands Government, represented by M.A. Fierstra, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; of the United Kingdom Government, represented by M. Hoskins, Barrister; and of the Commission, represented by M. Wolfcarius, at the hearing on 22 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1998,

gives the following

Judgment

Grounds

1 By order of 21 April 1997, received at the Court on 7 May 1997, the Tribunal du Travail de Bruxelles (Brussels Labour Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 14a(1)(a) and Article 14c 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 (Regulation No 1408/71), and of Articles 11a and 12a(7) of Council Regulation (EEC) No 574/72 of 21 March 1972, fixing the procedure for implementing Regulation

(EEC) No 1408/71 (Regulation No 574/72), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), and subsequently by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5).

2 Those questions were raised in proceedings between, on the one hand, Mr Banks, eight other opera singers and a conductor, supported by three other artists (hereinafter collectively referred to as Mr Banks and others), and, on the other, the Théâtre Royal de la Monnaie de Bruxelles (the TRM) concerning contributions which the latter deducted from the artists' fees under the general system of Belgian social security for employed persons.

3 Mr Banks and others are performing artists of British nationality. They reside in the United Kingdom where they normally work and are subject to the British social security system as self-employed persons. They were engaged by the TRM to perform in Belgium between 1992 and 1995. The engagements of each of the artists lasted for less than three months in total, save in the case of one of them, whose contracts covered a period of four months and six days.

4 The TRM withheld from their fees contributions due by reason of their being subject to the general system of social security for employed persons. That deduction was made pursuant to Article 3(2) of the Royal Decree of 28 November 1969, in implementation of the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for persons subject to the scheme for employed persons (Moniteur Belge, 5 December 1969), which extended the scheme to performing artists. The contracts of Mr Banks and others expressly provided that this deduction would be made.

5 In the course of their engagement or during the proceedings before the national court, Mr Banks and others each produced an E 101 certificate, issued by the United Kingdom Department of Social Security in accordance with Article 11a of Regulation No 574/72, certifying that they were self-employed, that they would be self-employed during their engagement with the TRM, and that, during that period, they remained subject to United Kingdom social security legislation in accordance with Article 14a(1)(a) of Regulation No 1408/71. Under that provision, a person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State is to continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed 12 months.

6 Mr Banks and others challenged their being made subject to the Belgian social security scheme for employed persons, and brought an action before the Tribunal du Travail de Bruxelles for reimbursement by the TRM of the amount of the contributions paid, together with interest at the statutory rate. They argued that since, while normally working as self-employed persons in the United Kingdom, they performed work in Belgian territory for a duration of less than 12 months, they remained, in accordance with Article 14a(1)(a) of Regulation No 1408/71, subject to United Kingdom legislation only. They further argued that the TRM and the Office National de Sécurité Sociale Belge (the national social security institution, hereinafter the ONSS) were obliged to recognise the E 101 certificates issued by the United Kingdom Department of Social Security.

7 The TRM argued that Belgian legislation applied on the basis of Article 14c(a) of Regulation No 1408/71, according to which a person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State is to be subject to the legislation of the Member State in the territory of which he is engaged in paid employment. The TRM added that, since the ONSS refused to take account of the E 101 certificates issued to British self-employed persons, it felt it had no alternative but to comply with that decision. For the most part, moreover, those certificates, whose retroactive effect was open to doubt, were not issued and were not submitted to it until during the period of the artists' engagement or during the proceedings before the Tribunal du Travail de Bruxelles.

8 In its order, the national court begins by referring to the judgments of the Court of Justice in Case C-340/94 De Jaeck v Staatssecretaris van Financen [1997] ECR I-461 and Case C-221/95 Inasti v Hervein and Hervillier [1997] ECR I-609, in which it ruled that, for the purposes of applying Articles 14a and 14c of Regulation No 1408/71, employed and self-employed should be understood to refer to activities which were regarded as such by the social security legislation of the Member State in whose territory those activities were pursued.

9 The national court then observes that the activity of the plaintiffs in the main proceedings is regarded as self-employed activity by United Kingdom social security legislation and as paid employment by the corresponding Belgian legislation.

10 It adds that, for Article 14a(1)(a) to apply in the case before it, as the performing artists maintain it should, it would be necessary for the word work, which appears in that provision, to be given a wide interpretation covering any performance of work, whether as an employee or as a self-employed person, which does not exceed 12 months.

11 If that were not so, the national court continues, Article 14c of Regulation No 1408/71 might be applicable to the plaintiffs in the main proceedings. It observes, however, that to apply that provision would lead to their being made subject to Belgian legislation alone, since they carried on an activity regarded in Belgium as that of an employed person, and that this would be so in respect of all their professional activities, pursuant to Article 14d of the same regulation. And yet, given the brevity of their activities in Belgium, the plaintiffs in the main proceedings would not qualify for any benefits under the Belgian system.

12 In those circumstances, the Tribunal du Travail de Bruxelles decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. (a) Does the concept of "work" in Article 14a(1)(a) of Regulation (EEC) No 1408/71 refer to any work, whether paid employment or self-employment, the duration of which does not exceed 12 months?

(b) If the concept of "work" within the meaning of Article 14a(1)(a) refers exclusively to work by a self-employed person, should this concept be defined by reference to the social security legislation of the Member State in which the person is normally self-employed or by reference to the social security legislation of the Member State in which the "work" is done?

2. What is the relevant unit of time which should be taken into account in defining the term "simultaneously" in Article 14c of Regulation (EEC) No 1408/71, or by what criteria can this term be defined?

3. (a) (i) Does Form E 101, the issue of which is provided for, in particular, by Articles 11a and 12a(7) of Regulation No 2001/83, have binding force as regards the legal consequences attested to therein:

- with respect to the competent institution of the Member State in which the second activity is pursued?

- with respect to the person employing a worker pursuing an activity in two Member States?

(ii) If so, until when?

(b) Does Form E 101 have retroactive effect in so far as the periods to which it relates have already come to an end at the time when the form is issued or produced?

The first question

13 By its first question, the national court is essentially asking whether the term work in Article 14a(1)(a) of Regulation No 1408/71 covers any performance of work, whether as an employed or self-employed person. If that provision were to refer only to work as a self-employed person, the national court is uncertain whether determination of the nature of the work concerned is a matter for the social security legislation of the Member State in which the person is normally self-employed or for the corresponding legislation of the Member State in which the work is done.

14 Article 13, the opening provision of Title II of Regulation No 1408/71 concerning the determination of the legislation applicable, provides in paragraph (1) that, subject to Article 14c, persons to whom the regulation applies shall be subject to the legislation of a single Member State only.

15 Under Article 13(2)(b) of Regulation No 1408/71, subject to Articles 14 to 17 of that regulation, a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State.

16 Article 14a of Regulation No 1408/71, headed Special rules applicable to persons, other than mariners, who are self-employed, provides that the rule in Article 13(2)(b) shall apply subject to the following exceptions and circumstances. Under Article 14a(1)(a), a person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed 12 months.

17 Mr Banks and others, the TRM, the United Kingdom Government and the Commission, supported at the hearing by the Irish Government, contend that the term work in Article 14a(1)(a) of Regulation No 1408/71 must be understood as denoting any performance of work, whether as an employed or self-employed person. In their submission, that interpretation is dictated by the very general meaning which that word has in everyday language. Mr Banks and others and the Commission further argue that the use of that term is the result of a deliberate choice by the Council when Council Regulation (EEC) No 1390/81 of 12 May 1981 was adopted to extend application of Regulation (EEC) No 1408/71 (OJ 1981 L 143, p. 1) to self-employed persons and members of their families. In its initial proposal, and in its amended proposal for a regulation, the Commission had, instead of using the word work, used the words provision of services, thereby intending to limit the application of the provision to cases where the self-employed person performs work in that capacity in the territory of another Member State.

18 Should the Court consider that work refers only to work as a self-employed person, Mr Banks and others, the TRM and the United Kingdom Government maintain that the nature of the work in question should be determined in accordance with the social security legislation of the Member State in whose territory the person concerned is normally self-employed. However, on the basis of the judgments in Jaeck and Hervein and Hervillier, cited above, the Commission contends that such determination would then be a matter for the social security legislation of the Member State in which the work is performed.

19 The German, French and Netherlands Governments maintain that the term work refers exclusively to self-employment, given that it is for the legislation of the Member State in which the work is performed to determine its nature. In their submission, that interpretation follows from the very heading of Article 14a of Regulation No 1408/71. It is also consistent with the corresponding provisions of Title II concerning workers and employed mariners who are posted to the territory of another Member State or on board a vessel flying the flag of another Member State in order to perform work there. Only if the work which they performed were in an employed capacity would those workers and mariners remain subject exclusively to the legislation of their Member State of

origin.

20 The interpretation of the term work put forward by the plaintiffs in the main proceedings, the Irish and United Kingdom Governments and the Commission must be upheld.

21 That interpretation arises, first, from the wording of Article 14a(1)(a) of Regulation No 1408/71. The word work ordinarily has a general meaning designating without distinction performance of work in either an employed or a self-employed capacity. Moreover, Article 14a(1)(a) is distinguishable in that respect from Article 14b(2), which provides that a person who is normally self-employed, either in the territory of a Member State or on board a vessel flying the flag of a Member State, and who performs work on board a vessel flying the flag of another Member State, remains subject to the legislation of the first Member State provided he performs that work on his own account.

22 It is true that, according to its heading, Article 14a of Regulation No 1408/71 applies to persons other than mariners who are self-employed. However, it cannot be inferred from this that the work referred to in Article 14a(1)(a) is necessarily of a self-employed nature. In that article, the expression self-employed refers to the activity normally pursued by the person concerned in the territory of one or more Member States, and not the occasional performance of work by him outside that State or those States.

23 The above interpretation of Article 14a(1)(a) of Regulation No 1408/71 is, moreover, confirmed by the circumstances in which that provision was adopted. It was inserted in that regulation by Regulation No 1390/81, which extended Regulation No 1408/71 to self-employed persons and members of their families. Both in its initial proposal for the adaptation of Regulation No 1408/71 (OJ 1978 C 14, p. 9) and in its amended proposal (OJ 1978 C 246, p. 2), the Commission used the words provision of services rather than work, thereby intending to restrict the application of the provision exclusively to cases where work is performed in a self-employed capacity in the territory of another Member State. Everything suggests, therefore, that the Council used the word work with the intention of also bringing work in an employed capacity within that provision.

24 The German and Netherlands Governments have, however, expressed concern that an interpretation of the word work which is not limited to self-employed activities would have serious consequences. In their submission, such an interpretation would enable any person to become affiliated to the social security scheme for self-employed persons of a Member State in which contributions are modest with the sole purpose of going to another Member State in order to work there for a year as an employed person without paying the higher contributions in force in that latter State.

25 In that respect, it should be pointed out that Article 14a(1)(a) of Regulation 1408/71 imposes the preliminary requirement that the person concerned be normally self-employed in the territory of a Member State. That obligation assumes that the person concerned habitually carries out significant activities in the territory of the Member State where he is established [see, by analogy, with regard to Article 14(1)(a) of Regulation No 1408/71 concerning the posting of employed persons, Case C-202/97 Fitzwilliam Executive Search v Bestuur van het Landelijk Instituut Sociale Verzekeringen [2000] ECR I-0000, paragraph 45]. Thus, such a person must already have been carrying out his activity for some time at the moment when he wishes to take advantage of the provision in question. Similarly, during the period in which he works in the territory of another Member State, that person must continue to maintain, in his State of origin, the necessary means to carry on his activity so as to be in a position to pursue it on his return.

26 As the Advocate General has observed in paragraph 59 of his Opinion, the maintenance of such an infrastructure in the State of origin involves, for example, such matters as the use of offices, payment of social security contributions, payment of taxes, possession of a work permit and VAT number, or registration with chambers of commerce and professional organisations.

27 Furthermore, application of Article 14a(1)(a) of Regulation No 1408/71 assumes that the person who is self-employed in the territory of a Member State carries out a work assignment (un travail) in the territory of another Member State, that is to say a defined task, the content and duration of which are determined in advance, and the genuineness of which must be capable of proof by production of the relevant contracts.

28 The answer to the first question must therefore be that the term work in Article 14a(1)(a) of Regulation No 1408/71 covers any performance of work, whether in an employed or self-employed capacity.

The second question

29 In its second question, the national court inquires as to the interpretation of the word simultaneously in Article 14c of Regulation No 1408/71.

30 It is clear from the order for reference that the application in the case in the main proceedings of Article 14a(1)(a) of Regulation No 1408/71 assumes that the term work in that provision refers to any performance of work, whether in an employed or self-employed capacity, and that the second question was raised only in the event of Article 14a(1)(a) not being applicable in this case.

31 Having regard to the reply given to the first question, there is therefore no need to reply to the second question.

The first part of the third question

32 In the first part of the third question, the national court is essentially asking whether the E 101 certificate, issued in accordance with Articles 11a and 12a(7) of Regulation No 574/72, binds both the competent institution of the Member State in which the work assignment is carried out and the person who calls upon the services of self-employed persons holding that certificate. In the event of an affirmative answer, the national court enquires as to the duration of the binding effect of that certificate.

33 Article 11a of Regulation No 574/72 provides inter alia that the institution designated by the competent authority of the Member State whose legislation is to remain applicable by virtue of Article 14(1) of Regulation No 1408/71 shall issue a certificate stating that the self-employed person remains subject to that legislation up to the date specified therein. According to Article 12a(7) of the same regulation, where Article 14c(a) of Regulation No 1408/71 applies, the institution designated by the competent authority of the Member State in whose territory the person is employed shall issue to the latter a certificate stating that he is subject to that legislation. Since, however, for the reasons stated in paragraphs 29 to 31 of this judgment, Article 14c is not relevant in the case in the main proceedings, it is not necessary to examine Article 12a(7) of Regulation No 574/72.

34 By Decision No 130 of 17 October 1985 on the model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001; E 101-127; E 201-215; E 301-303; E 401-411) (OJ 1986 L 192, p. 1), which applied at the material time in the case in the main proceedings, the Administrative Commission of the European Communities on Social Security for Migrant Workers (the Administrative Commission), referred to in Articles 80 and 81 of Regulation No 1408/71, established inter alia, for the certification referred to in Article 11a of

Regulation No 574/72, a model certificate, known as Form E 101.

35 Mr Banks and others, the TRM and the Irish and United Kingdom Governments maintain that, so long as it has not been withdrawn by the issuing institution, the E 101 certificate has binding force vis-à-vis the competent institutions of the other Member States. If it were otherwise, the functioning of the system for regulating conflicts of laws, established by Title II of Regulation No 1408/71, would be undermined. The United Kingdom Government contends that the certificate is also binding on persons who engage workers who hold it. On that point, the TRM contends, by contrast, that those persons are bound by the rules of the competent institution of the Member State under whose jurisdiction they fall.

36 The German, French and Netherlands Governments, and the Commission, point to the fact that the social security legislation applicable to workers is determined by Title II of Regulation No 1408/71. In their submission, it is not possible to exclude the possibility that the competent authority which issued the E 101 certificate might have reached the conclusion that its own legislation applied on the basis of factual inaccuracy or erroneous analysis. Thus, even if the E 101 certificate constitutes a powerful indicator of the applicable legislation, the competent institutions of the other Member States are, they maintain, entitled in appropriate cases to reach a different conclusion.

37 The German and Netherlands Governments contend that, in that event, institutions other than the issuing institution are entitled to disregard the E 101 certificate. The Commission, however, insists upon the duty of sincere cooperation between the competent institutions of the Member States. Thus, in the event of the issuing institution refusing to accede to a request for withdrawal made by another institution, it would be for the latter to refer the dispute to the national courts.

38 It should be pointed out that the principle of sincere cooperation, laid down in Article 5 of the EC Treaty (now Article 10 EC), requires the issuing institution to carry out a proper assessment of the facts relevant to application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information contained in an E 101 certificate (see Fitzwilliam Executive Search, cited above, paragraph 51).

39 It is clear from the obligations to cooperate arising from Article 5 of the Treaty that those obligations would not be fulfilled - and the aims of Article 14a(1)(a) of Regulation No 1408/71 and Article 11(a) of Regulation No 574/72 would be thwarted - if the competent institution of the Member State in which the work assignment is carried out were to consider that it was not bound by the certificate and made the self-employed person subject to its own social security system (Fitzwilliam Executive Search, paragraph 52).

40 Consequently, in so far as an E 101 certificate establishes a presumption that the self-employed person concerned is properly affiliated to the social security system of the Member State in which he is established, it is binding on the competent institution of the Member State in which that person carries out a work assignment (Fitzwilliam Executive Search, paragraph 53).

41 If that were not so, the principle that self-employed persons are to be covered by only one social security system would be undermined, as would the predictability of the system to be applied and, consequently, legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the self-employed person concerned, that their own social security system was applicable (Fitzwilliam Executive Search, paragraph 54).

42 Consequently, so long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State in which the self-employed person carries out a work assignment must take account of the fact that that person is already subject to the social security legislation of the Member State in which he is established, and that institution cannot therefore

subject the self-employed person in question to its own social security system (Fitzwilliam Executive Search, paragraph 55).

43 However, it is incumbent on the competent institution of the Member State which issued the E 101 certificate to reconsider whether it was properly issued and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the self-employed person carries out a work assignment expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Article 14a(1)(a) of Regulation No 1408/71 (Fitzwilliam Executive Search, paragraph 56).

44 Should the institutions concerned not reach agreement on, in particular, the question how the particular facts of a specific case are to be assessed and consequently on the question whether that case is covered by Article 14a(1)(a) of Regulation No 1408/71, it is open to them to refer the matter to the Administrative Commission (Fitzwilliam Executive Search, paragraph 57).

45 If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, it is open to the Member State in the territory of which the self-employed person carried out a work assignment, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at the very least to bring infringement proceedings under Article 170 of the EC Treaty (now Article 227 EC) in order to enable the Court to examine in those proceedings the question of the legislation applicable to that self-employed person and, consequently, the correctness of the information contained in the E 101 certificate (Fitzwilliam Executive Search, paragraph 58).

46 It follows from the above that, so long as it has not been withdrawn or declared invalid, an E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, is binding on the competent institution of the Member State to which the self-employed person goes in order to carry out a work assignment.

47 Since, moreover, the E 101 certificate is binding on that competent institution, there can be no justification for the person who calls on that worker's services not to act upon that certificate. If he has doubts as to the validity of the certificate, that person must however inform the institution in question.

48 The answer to the first part of the third question must therefore be that, so long as it has not been withdrawn or declared invalid, an E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, is binding both on the competent institution of the Member State to which a self-employed person goes in order to carry out a work assignment and the person who calls upon the services of that worker.

The second part of the third question

49 In the second part of its third question, the national court asks whether an E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, may have retroactive effect where it relates to a period which has wholly or partially elapsed at the time of its issue.

50 Mr Banks and others, the German, French, Netherlands and United Kingdom Governments and the Commission propose that this question be answered in the affirmative. They argue, in particular, that Regulation No 574/72 does not require the certificate to be issued before the work assignment in the territory of the second Member State begins.

51 The TRM, however, considers that the late issuing or production of an E 101 certificate makes it impossible for the person who has recourse to the services of the workers concerned to take account of it in good time.

52 In that respect, it should first be noted that Article 11a of Regulation No 574/72 does not impose any time-limit for the issue of the certificate referred to therein.

53 Moreover, when issuing the E 101 certificate pursuant to Article 11a, the competent institution of a Member State does no more than state that the self-employed person concerned remains subject to the legislation of that Member State throughout a given period in the course of which he carries out a work assignment in the territory of another Member State. Although it should preferably be made before the beginning of the period concerned, such a statement may also be made during that period or indeed after its expiry.

54 There is therefore nothing to prevent the E 101 certificate from producing retroactive effects, according to the circumstances.

55 Thus, Decision No 126 of the Administrative Commission of 17 October 1985 concerning the application of Articles 14(1)(a), 14a(1)(a), 14b(1) and (2) of Regulation No 1408/71 (OJ 1986 C 141, p. 3) provides that the institution referred to in Articles 11 and 11a of Regulation No 574/72 is required to issue a certificate concerning the applicable legislation (the E 101 certificate), even if issue of that certificate is requested after the beginning of the activity carried out in the territory of the State other than the competent State by the worker concerned.

56 Moreover, the Court implicitly acknowledged that the E 101 certificate may produce retroactive effects when it held that the option which Article 17 of Regulation No 1408/71 confers on Member States to agree, in the interest of a worker, to apply a legislation different from that designated by Articles 13 to 16 also applies in respect of periods that have already expired (Case 101/83 Raad van Arbeid v Brusse [1984] ECR 2223, paragraphs 20 and 21; Case C-454/93 Rijksdienst voor Arbeidsvoorziening v Van Gestel [1995] ECR I-1707, paragraph 29). Articles 11 and 11a of Regulation No 574/72 also provide that, in such a situation, an E 101 certificate is to be issued.

57 The answer to the second part of the third question must therefore be that the E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, may have retroactive effect.

Decision on costs

Costs

58 The costs incurred by the German, French, Irish, Netherlands and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal du Travail de Bruxelles by order of 21 April 1997, hereby rules:

1. The term work in Article 14a(1)(a) 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 (EEC) No 2001/83 of 2 June 1983, and subsequently by Council Regulation (EEC) No 3811/86 of 11 December 1986, covers any performance of work, whether in an employed or self-employed capacity.

2. So long as it has not been withdrawn or declared invalid, an E 101 certificate, issued in accordance with Article 11a of Council Regulation (EEC) No 574/72 of 21 March 1972, fixing the procedure for implementing Regulation No 1408/71, as amended and updated by Regulation No 2001/83 and subsequently by Regulation No 3811/86, is binding both upon the competent institution of the Member State to which a self-employed person goes in order to carry out a work assignment and the person who calls upon the services of that worker.

3. The E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, may have retroactive effect.