62011CJ0137
JUDGMENT OF THE COURT (Fourth Chamber)

27 September 2012 (*1)

?Social security for migrant workers — Regulation (EEC) No 1408/71 — Articles 13 and 14c — Legislation applicable — Self-employed persons — Social security scheme — Insurance — Person employed or unemployed in a Member State — Self-employed activity in another Member State — Company agent — Residence in a Member State other than the State where the company has its registered office — Management of the company from the State of residence — National legislation establishing an irrebuttable presumption of pursuing a professional activity as a self-employed person in the Member State where the company has its registered office — Obligatory insurance with that State's social security scheme for self-employed persons'

In Case C-137/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the cour du travail de Bruxelles (Belgium), made by decision of 11 March 2011, received at the Court on 21 March 2011, in the proceedings

Partena ASBL

v

Les Tartes de Chaumont-Gistoux SA,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), C. Toader and E. Jaraši?nas, Judges,

Advocate General: J. Mazák,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 22 March 2012,

after considering the observations submitted on behalf of:

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Partena ASBL, by M. Lauwers, avocate,

—

Les Tartes de Chaumont-Gistoux SA, by A. Moyaerts and É. Piret, avocats,

—

the Belgian Government, by L. Van den Broeck and J.-C. Halleux, acting as Agents,

—

the European Commission, by V. Kreuschitz and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2012,

gives the following

Judgment

1

This reference for a preliminary ruling concerns the interpretation of Articles 13 and 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 (OJ English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1), (‘Regulation No 1408/71’) and Article 21 TFEU.

2

The reference has been made in proceedings between Partena ASBL (‘Partena’), the social insurance office for self-employed persons in Belgium, and Les Tartes de Chaumont-Gistoux SA (‘Les Tartes de Chaumont-Gistoux’) concerning the recovery by Partena from that company of social security contributions and surcharges for the period from the first quarter of 1999 to the fourth quarter of 2007.

Legal context

European Union law

3

The 8th to 11th recitals in the preamble to Regulation No 1408/71 state:

‘Whereas employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom;

Whereas the instances in which a person should be subject simultaneously to the legislation of two Member States as an exception to the general rule should be as limited in number and scope as possible;

Whereas with a view to guaranteeing the equality of treatment of all workers occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment or self-employment;

Whereas in certain situations which justify other criteria of applicability, it is possible to derogate from this general rule’.

4

Article 13 of Regulation No 1408/71, entitled ‘General rules’, 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 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;

(b)

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;

…’

5

Article 14a(2) of that regulation, entitled ‘Special rules applicable to persons, other than mariners, who are self-employed’, is worded as follows:

‘Article 13(2)(b) shall apply subject to the following exceptions and circumstances:

…

(2) 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. If he does not pursue any activity in the territory of the Member State in which he resides, he shall be subject to the legislation of the Member State in whose territory he pursues his main activity …’

6

Article 14c of that regulation, entitled ‘Special rules applicable to persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State’, provides:

‘A person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

(a)

save as otherwise provided in subparagraph (b) to the legislation of the Member State in the territory of which he is engaged in paid employment or, where he pursues such an activity in the territory of two or more Member States, to the legislation determined [as appropriate, by the Member State in which the undertaking or employer has its registered office or place of business, the Member State in which the undertaking has a branch or permanent representation, or the Member State of residence of the person in question];

(b)

in the cases mentioned in Annex VII:

—

to the legislation of the Member State in the territory of which he is engaged in paid employment …

and

—

to the legislation of the Member State in the territory of which he is self-employed …’

7

Annex VII to Regulation No 1408/71 lists 18 scenarios where two Member States’ legislation could be cumulatively applied, namely situations in which a person is, first, self-employed in one of the 17 Member States particularly referred to in that Annex, and, second, employed in another Member State.

8

Point 1 thereof lists:

‘Where he is self-employed in Belgium and gainfully employed in any other Member State.’

Belgian Law

9

Under Belgian law, coverage by the social security scheme for self-employed persons is governed, in particular, by 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), which was amended, in particular, by Royal Decree of 18 November 1996 on the financial and other provisions on the social security scheme for self-employed workers, pursuant to Title VI of the Law of 26 July 1996 on the modernisation of the social security system and assuring the viability of the statutory pension schemes and Article 3 of the Law of 26 July 1996 to ensure the budgetary conditions for Belgian participation in the European Economic and Monetary Union (Moniteur belge, 12 December 1996) (‘Royal Decree No 38’).

10

Article 3(1) of Royal Decree No 38, included in Chapter I entitled ‘Scope’, 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 [certain provisions of the 1992 Income Tax Code] shall be presumed to fall within the qualifying conditions referred to in the preceding paragraph.

For the purposes of this paragraph, an occupational activity shall be deemed to be pursued under

a contract of employment where, when applying one of the social security schemes for employees, the person in question is presumed, on that ground, to be bound by a contract of employment.

… Persons designated as agents of a company or association which is liable to pay Belgian corporation tax or the Belgian tax on non-residents shall be irrebuttably presumed to pursue in Belgium a professional activity as self-employed persons.’

11

Pursuant to the third subparagraph of Article 15(1) of Royal Decree No 38, companies are jointly and severally liable for the payment of social security contributions by their agents.

12

By judgment 176/2004 of 3 November 2004, the Cour d’arbitrage (Court of Arbitration), now the Cour constitutionnelle (Constitutional Court), declared subparagraph 4 of Article 3(1) of Royal Decree No 38 unconstitutional, in particular in respect of the agents of companies which are liable to pay Belgian corporation tax or the Belgian tax on non-residents and who do not manage from abroad a company covered by the provision in question. That court considered that, in respect of those agents, the presumption, being irrebuttable, had a general and absolute nature which was disproportionate with regard to those persons, as it prevented an agent who had ceased his activity from proving that cessation other than by resigning and terminating his obligations under the social security scheme for self-employed persons.

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However, the Cour d’arbitrage did not consider that subparagraph 4 of Article 3(1) of Royal Decree No 38 was unconstitutional in so far as it concerned agents managing from abroad companies whose registered office is in Belgium. That court considered that the irrebuttable nature of the presumption could be considered necessary in order to ensure that such agents were subject to the social security scheme for self-employed persons, given that the national authority did not have, in relation to such persons, the information and powers it had in relation to agents managing companies in Belgium.

14

It follows from that judgment by the Cour d’arbitrage that, currently, under Belgian law, the presumption remains irrebuttable in respect of persons managing from abroad companies whose registered office is in Belgium, with the result that, irrespective of whether such activity is actually pursued, those persons are covered by the social security scheme for self-employed persons in Belgium.

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

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Les Tartes de Chaumont-Gistoux was established on 17 April 1993.

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Since its registered office is in Belgium, that company is subject to Belgian corporation tax.

17

On 12 October 1995, the date of the general meeting, Messrs Rombouts and Van Acker each owned half of the company's capital. The general meetings of 7 June 2000 and of 7 June 2006 renewed their terms of office as directors.

18

Mr Rombouts has been resident in Portugal since the end of 1999.

19

He has been employed there, or has been in receipt of unemployment benefit there, from January 2001 to July 2005.

20

According to the referring court, Mr Rombouts has been self-employed in Portugal since November 2007. That court adds that Les Tartes de Chaumont-Gistoux maintains that this period of self-employment began in November 2005.

21

On 28 May 2008, Partena served on Mr Rombouts and on Les Tartes de Chaumont-Gistoux an order requiring payment of EUR 125 696.50 corresponding to contributions and quarterly and annual surcharges owed by Mr Rombouts for the period from the first quarter of 1999 to the fourth quarter of 2007.

22

By an action brought on 5 August 2008, Les Tartes de Chaumont-Gistoux opposed that order before the tribunal du travail de Nivelles (Labour Court, Nivelles).

23

Ruling on that opposition, the tribunal du travail de Nivelles declared the opposition admissible by judgment of 14 September 2009, and subsequently declared, by judgment of 14 December 2009, that it was well founded.

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On 29 January 2010, Partena lodged an appeal against those judgments.

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In the course of the proceedings, Partena admitted that, in view of Mr Rombouts' employee status in Portugal since 1 January 2001, he could no longer be subject to the Belgian social security scheme for self-employed persons on more than a secondary basis. Thus the amount currently claimed by Partena is EUR 68 137.61 plus interest, rather than EUR 125 696.50.

26

Les Tartes de Chaumont-Gistoux disputed all claims that Mr Rombouts was subject to the social security scheme for self-employed persons in Belgium. It claimed that subparagraph 4 of Article 3(1) of Royal Decree No 38, in so far as it applies Belgian legislation, is contrary to EU law, in particular Article 18 EC.

27

In those circumstances, the cour du travail de Bruxelles (Higher Labour Court, Brussels) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

For the purposes of applying Article 13 et seq. of Regulation No 1408/71 and, more specifically, Article 14c thereof, may a Member State, within the framework of its powers to define the conditions for coverage by its social security scheme for self-employed persons, treat the “management from abroad of a company which is liable to tax in that State” in the same way as the exercise of an activity within its territory?

(2)

Is subparagraph 4 of Article 3(1) of [Royal Decree No 38] compatible with the law of the European Union and, in particular, with freedom of movement and of residence as guaranteed by Article 21 [TFEU], in so far as it does not allow a person who is resident in another Member State and who manages from abroad a company which is liable to Belgian tax to rebut the presumption that he is covered by the social security scheme for self-employed persons, whereas an agent who is resident in Belgium and who does not manage such a company from abroad has the right to rebut that presumption and to adduce evidence that he is not carrying on an activity as a self-employed person for the purposes of subparagraph 1 of Article 3(1) of Royal Decree No 38?’

Consideration of the questions referred

Question 1

Jurisdiction

28

The Belgian Government submits that the Court does not have jurisdiction to answer the first question referred since it requires the Court either to interpret the fourth subparagraph of Article 3(1) of Royal Decree No 38 or to examine its compatibility with Article 14c of Regulation No 1408/71.

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In that regard, it is sufficient to state that that first question, by its wording, seeks the interpretation of provisions of EU law, in the present case Article 13 et seq. of Regulation No 1408/71, and not the interpretation of a provision of national law or an assessment of that provision’s compatibility with EU law.

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According to settled case-law (see, inter alia, Case C-489/09 Vandoorne [2011] ECR I-225,

paragraph 25 and the case-law cited), the Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether a provision of national law is compatible with European Union law in order to give judgment in the proceedings before it.

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Accordingly, the Court has jurisdiction to examine the first question referred.

Admissibility

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The Belgian Government submits that the first question referred is inadmissible, on the ground that it is irrelevant, for the purposes of resolving the dispute in the main proceedings, to interpret Article 14c(b) of Regulation No 1408/71.

33

According to the Belgian Government, there is no need to apply the irrebuttable presumption set out in the fourth subparagraph of Article 3(1) of Royal Decree No 38 with regard to Mr Rombouts' being covered by the Belgian social security scheme for self-employed persons.

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That presumption is intended to cover agents who manage from abroad companies with their registered office in Belgium and who do not declare any income as company directors in that Member State, invoking the non-remunerated nature of their mandate in order to rule out the exercise of a professional activity, such an activity being a prerequisite for coverage by the social security scheme.

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According to the Belgian Government, during the period in question in the dispute in the main proceedings, Mr Rombouts was liable to pay the Belgian tax on non-residents due to his activity as an agent of the company (as a director thereof) in accordance with Articles 2(1)(a), 227(1) and 228(1) of the 1992 Income Tax Code and Article 16 of the Agreement between Belgium and Portugal for the avoidance of double taxation and the regulation of certain other matters with respect to taxes on income, signed at Brussels on 16 July 1969 (United Nations Treaty Series, vol. 787, p. 4), as amended by a further agreement signed at Brussels on 6 March 1995 (United Nations Treaty Series, vol. 2155, p. 76), which came into force on 5 April 2001.

36

The Belgian Government adds that Mr Rombouts has never contested the fact that he was liable to pay Belgian income tax, and that the social security contributions forming the subject-matter of the dispute in the main proceedings were calculated on the basis of his income as company director as taken into account by the tax administration.

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Thus neither Mr Rombouts nor Les Tartes de Chaumont-Gistoux may invoke the non-remunerated nature of his mandate in order to dispute his exercise of a professional activity.

38

In that regard, it is sufficient to state that, in its written observations, the Belgian Government explained that the presumption set out in the fourth subparagraph of Article 3(1) of Royal Decree No 38 irrebuttably provides for company agents to be covered by the Belgian social security scheme for self-employed persons, ‘even’ when they have not declared any income on the grounds of their mandate.

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That means that, according to the Belgian Government itself, that presumption also applies to a company agent, such as the one in question in the main proceedings, who is liable in Belgium to pay the tax on non-residents due to his activity as an agent of the company.

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Therefore, the first question referred is not irrelevant in so far as it refers to Article 14c(b) of Regulation No 1408/71.

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It is, accordingly, admissible.

Substance

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As a preliminary point, it should be noted that the referring court has defined the dispute brought before it as concerning the situation relating to the periods during which the company agent in question was resident in Portugal and was employed or exercised no other activity there. It considers that, for those periods, Regulation No 1408/71 and Annex VII thereto do not seem to exclude that agent from being covered by the Belgian social security scheme for self-employed persons. The Court must confine its examination to that situation alone.

43

In that context, it must be considered that, by its first question, the referring court asks, in essence, whether EU law, in particular Articles 13(2)(b) and 14c(b) of Regulation No 1408/71 and Annex VII thereto, precludes national legislation which, like the fourth subparagraph of Article 3(1) of Royal Decree No 38, allows a Member State to presume irrebuttably that management from another Member State of a company subject to tax in the first Member State has taken place in that first Member State.

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By that question, the referring court thus asks how far a Member State may, for the purposes of cover by its social security scheme for self-employed persons, determine the location where the activity of the workers in question takes place.

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In that regard, it should be borne in mind that, according to settled case-law, the objective of the provisions of Title II of Regulation No 1408/71, which determine the legislation applicable to workers moving within the European Union, is to ensure, in particular, that the persons concerned

are, in principle, subject to the social security scheme of only one Member State in order to prevent more than one system of national legislation from being applicable and to avoid the complications which may result from that situation. That principle is expressed, in particular, in Article 13(1) of Regulation No 1408/71 (see, inter alia, June 2012 in Joined Cases C-611/10 and C-612/10 Hudzinski and Wawrzyniak [2012] ECR, paragraph 41).

46

It should also be borne in mind that the provisions of Regulation No 1408/71 must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers (see Hudzinski and Wawrzyniak, paragraph 53).

47

The eighth recital in the preamble to Regulation No 1408/71 emphasises that the employed persons and self-employed persons in question should be subject to the social security scheme of only one single Member State. The ninth recital in that preamble adds that the instances in which a person should be subject simultaneously to the legislation of two Member States as an exception to that general rule should be as limited in number and scope as possible.

48

According to the 10th recital in that preamble, the appropriate criterion for determining the legislation applicable is, as a general rule, the location where the employed or self-employed activity takes place. The 11th recital envisages derogation from that general rule only in certain situations which justify other criteria of applicability.

49

It is thus clear from the broad logic and scheme of Regulation No 1408/71 that the criterion of the ‘location’ of the employed or self-employed activity of the person concerned is the main criterion for designating a single legislation which is applicable and that that criterion should be derogated from only in specific situations, using subsidiary criteria such as the person’s State of residence, the State in which the company employing him has its registered office or in which that company has a branch or permanent representation, or the location in which the person’s main activity takes place, as provided for in Articles 14(2) and (3), 14a(2) and (3) and the last part of Article14c(a) of Regulation No 1408/71.

50

The concepts of ‘employed’ and ‘self-employed’ activity referred to in Article 13 et seq. of Regulation No 1408/71 refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in whose territory those activities are pursued (see, inter alia, Case C-340/94 de Jaeck [1997] ECR I-461, paragraph 34, and Case C-221/95 Hervein and Hervillier [1997] ECR I-609, paragraph 22).

51

Therefore, those concepts, in terms of their content, fall under the legislation of the Member States in whose territory the employed or self-employed activity is pursued.

52

Accordingly, for the purposes of Article 13 et seq. of Regulation No 1408/71, the determining of the location of the person's professional activity — which, as is apparent from the 10th recital of that regulation, is the basis as a general rule for determining the legislation applicable — precedes qualifying that activity as an employed or a self-employed activity.

53

However, unlike the concepts of 'employed' and 'self-employed' activity, the concept of the 'location' of an activity must be considered to be a matter, not for the legislation of the Member States, but for EU law and, consequently, for interpretation by the Court.

54

If that concept was also a matter for the legislation of the Member States, it could be subject to contradictory definitions or interpretations by the Member States in question and could lead, for any given person, to the cumulative application of different legislation to the same activity. That overlapping could result in that person having to pay a double social insurance contribution for a single income and would thus penalise a person who had exercised his right to freedom of movement as enshrined in EU law, which would be manifestly contrary to the objectives of Regulation No 1408/71.

55

As the Court has held in relation to Article 14d(2) of Regulation No 1408/71, that provision requires Member States to treat workers subject to the provisions of Article 14c(b) thereof without discrimination as compared with workers pursuing all their activities in a single Member State (see Case C-493/04 Piatkowski [2006] ECR I-2369, paragraph 27).

56

For the purposes of interpreting the concept of 'location' as a concept of EU law, it should be borne in mind that, according to settled case-law, the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (see, inter alia, Case C-336/03 easyCar [2005] ECR I-1947, paragraph 21 and the case-law cited).

57

In that regard, the concept of the 'location' of an activity must be understood, in accordance with the primary meaning of the words used, as referring to the place where, in practical terms, the person concerned carries out the actions connected with that activity.

58

By irrebuttably presuming that persons designated as agents of a company or association which is liable to pay Belgian corporation tax or the Belgian tax on non-residents who pursue in Belgium a professional activity as self-employed persons, the provisions of national law in question are thus liable to lead to a definition of the location of an activity which does not correspond to the definition resulting from the preceding paragraph of this judgment and are thus liable to be contrary to EU law.

59

Although EU law does not detract from the power of the Member States to organise their own social security systems and, in the absence of harmonisation at Community level, it is for the legislation of the Member State concerned to determine the conditions governing the right or duty to be insured with a social security scheme, it is nonetheless necessary, when the Member State concerned exercises that power, that it comply with EU law (see, inter alia, Piatkowski, paragraphs 32 and 33).

60

It is true that, as the Belgian government claims, the presumption at issue in the main proceedings may prevent social security fraud consisting of eluding the otherwise obligatory social security scheme for self-employed persons by artificially relocating the activity of agents of companies established in Belgium. However, by making that presumption an irrebuttable one, the national legislation at issue goes further than is strictly necessary for attaining that legitimate objective of combating fraud since it thereby acts as a general impediment to those persons' ability to prove, before the national court, that the location of their activity is actually in another Member State where they carry out, in fact, the actions connected with that activity.

61

Therefore, the answer to the first question referred is that EU law, in particular Articles 13(2)(b) and 14c(b) of Regulation No 1408/71 and Annex VII thereto, precludes national legislation such as that at issue in the main proceedings in so far as it allows a Member State to presume irrebuttably that management from another Member State of a company subject to tax in the first Member State has taken place in that first Member State.

Question 2

62

In the light of the answer to the first question, it is not necessary to examine the second question referred.

Costs

63

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

EU law, in particular Articles 13(2)(b) and 14c(b) 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 by Council Regulation (EC) No 1606/98 of 29 June 1998, and Annex VII thereto, precludes national legislation such as that at issue in the main proceedings in so far as it allows a Member State to presume irrebuttably that management from another Member State of a company subject to tax in the first

Member State has taken place in that first Member State.

[Signatures]

(*1) Language of the case: French.