Downloaded via the EU tax law app / web

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 26 June 2012 (1)

Case C-137/11

Partena ASBL

v

Les Tartes de Chaumont-Gistoux SA

(Reference for a preliminary ruling
from the Cour du Travail de Bruxelles (Belgium))

(Social security – Regulation (EEC) No 1408/71 – Articles 13 and 14c – Member State where an activity is exercised – Non-discrimination – Free movement of persons – Right of establishment)

I – Introduction

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 (2) as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (3) and Article 21 TFEU.

2. The reference was made in the context of an action by Partena ASBL ('Partena'), the social insurance office for independent workers in Belgium, and Les Tartes de Chaumont-Gistoux SA ('the Company') for the recovery of social security contributions owed by Mr Rombouts, an agent of the Company, for the period from the first quarter of 1999 to the fourth quarter of 2007.

3. The referring court seeks clarification on whether the management from abroad of a company which is subject to tax in a Member State can be considered as the exercise of that activity in that Member State for the purposes of social security contributions. The referring court also questions whether an irrebuttable presumption, established by law, pursuant to which a company agent who manages from abroad of a company, which is subject to tax in a Member State, is covered by the social security scheme for self-employed persons of that Member State, is precluded by Article 21 TFEU.

II – Legal context

A – *Union law*

4. I consider that Article 45 TFEU and Article 49 TFEU are applicable to the present case.

Article 13 and Article 14 of Regulation No 1408/71, found in Title II of that regulation and entitled 'Determination of the legislation applicable' are also applicable.

B – *National law*

5. Under Belgian law, coverage by the social security scheme for self-employed persons is governed by Royal Decree No 38 of 27 July 1967 on the application of the social security scheme for self-employed persons, (4) which was amended, in particular, by Royal Decree of 18 November 1996 on the financial and other provisions on the social statute of independent 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 legal pension schemes and Article 3 of the Law of 26 July 1996 which ensures the budgetary conditions for Belgian participation in the Economic and Monetary Union. (5)

6. Article 3(1) of Royal Decree No 38 on the application of the social security scheme for self-employed persons, 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'.

7. The following new subparagraph 4 was added by a Royal Decree of 18 November 1996 to Article 3(1) of Royal Decree No 38:

'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.'

8. By judgment 176/2004 of 3 November 2004, the Constitutional Court (6) declared in subparagraph 4 of Article 3(1) of Royal Decree No 38 unconstitutional 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 the company in question from abroad. That court considered that the irrebuttable presumption in respect of those agents was disproportionate as it prevented agents who had ceased their activity from proving that cessation other than by resigning and terminating their obligations resulting from their status as self-employed workers. The Constitutional Court did not however consider that the provision in question was unconstitutional in respect of agents managing such companies from abroad. 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 those agents that manage companies in Belgium.

9. Pursuant to Article 15(1)(3) of Royal Decree No 38, companies are jointly and severally liable for the payment of the contributions of their agents.

III – **Dispute in main proceedings and questions referred**

10. The Company was established on 17 April 1993. It is subject to Belgian tax as its registered office is there. At the general meeting of 12 October 1995, Mr Rombouts and Mr 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.

11. Mr Rombouts has been resident in Portugal since the end of 1999. He has been employed there, or has been in receipt of unemployment benefit there, from 1 January 2001 to July 2005. According to the referring court, Mr Rombouts has been self-employed in Portugal from November

2007. That court notes that the Company maintains that this period of self-employment began in November 2005.

12. On 28 May 2008, Partena served on Mr Rombouts and on the Company an order requiring payment of EUR 125 696.50 corresponding to contributions owed by Mr Rombouts for the period from the first quarter of 1999 to the fourth quarter of 2007.

13. By an action brought on 5 August 2008, the Company opposed that order before the Tribunal du travail (Labour Court) of Nivelles (Belgium). By judgment of 14 December 2009, the Tribunal du travail declared, inter alia, that the opposition was justified.

14. Partena lodged an appeal before the Cour du travail de Bruxelles (Belgium) on 29 January 2010. In the course of the proceedings, Partena admitted that, in view of Mr Rombouts' employee status in Portugal since 1 January 2001, he can no longer be covered by the Belgian social security scheme for self-employed persons on more than a secondary basis. Thus the amount currently claimed by Partena is EUR 68 317.61 plus interest, rather than the sum of EUR 125 696.50.

15. The Company claims that the judgment of the Tribunal du travail should be upheld and that Partena should be ordered to pay the costs. The Company disputes the claim that Mr Rombouts is covered by the social security scheme for self-employed workers in Belgium. In the alternative, the Company requests that a reference be made to the Court for a preliminary ruling on the question whether, inter alia, subparagraph 4 of Article 3(1) of Royal Decree No 38 is in conformity with Article 18 EC (now Article 21 TFEU).

16. It was in those circumstances that the Cour du travail de Bruxelles (Belgium) referred the following questions to the Court 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 Decree No 38 of 27 July 1967 organising the social security scheme for self-employed persons compatible with the law of the European Union and, in particular, with freedom of movement and of residence as guaranteed by Article 21 of the Treaty on the Functioning of the European Union, 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?'

IV – **Procedure before the Court**

17. Written observations were submitted by the Company, the Belgian Government and the Commission. They also presented oral submissions at the hearing on 22 March 2012.

V – **Assessment**

A – *Admissibility*

18. The Belgian Government raises two objections to admissibility.

19. Firstly, the Belgian Government considers that the two questions referred are inadmissible as the irrebuttable presumption in question is not applicable to Mr Rombouts. That presumption only applies to agents who manage from abroad companies having their registered office in Belgium and who do not declare any revenue as agents in that State by invoking the non-remunerated nature of their mandate. According to the Belgian Government this is done to avoid paying social security contributions, as in order to be considered a self-employed worker in Belgium, a worker must exercise, inter alia, a professional activity, a concept which requires that the activity be for remuneration.

20. The Belgian Government claims that during the period in question in the main action, Mr Rombouts was subject to Belgian tax as a non-resident due to his activity as an agent of the Company in accordance with Articles 2(1)(1)(a), 227(1) and 228(1) of the 1992 Income Tax Code and Article 16 of the Double Taxation Treaty between Belgium and Portugal. (7)

21. Moreover, according to the Belgian Government, Mr Rombouts did not contest the fact that he was subject to Belgian income tax. His social security contributions were calculated on the basis of his revenue as agent which was taken into account by the tax administration and communicated to the Institut National d'Assurances Sociales pour Travailleurs Indépendants ('Inasti'). Thus neither Mr Rombouts nor the Company may invoke the non-remunerated nature of his mandate by relying on non-compliance with the requirement of the exercise of a professional activity.

22. Secondly, according to the Belgian Government, the questions referred are inadmissible as they seek an assessment of whether national law is compatible with EU law.

23. In my view, there are no grounds for accepting the first objection of inadmissibility raised by the Belgian Government. While the interpretation of national and international tax law proposed by the Belgian Government may be correct, I consider that it is clear from the order for reference that the dispute which the referring court must resolve concerns whether Belgian social security legislation is applicable to Mr Rombouts. Such an assessment is necessarily based on the rules contained in Title II of Regulation No 1408/71 which concern the determination of the legislation applicable. In addition, the referring court seeks guidance on the interpretation of the rules of free movement laid down by the Treaty. (8) In those circumstances, the questions referred for a preliminary ruling are admissible.

24. As regards the second objection to admissibility to the effect that the questions seek an assessment as to whether national law is compatible with EU law, it is sufficient to state that it is clear from the wording of those questions that they seek an interpretation of EU law, in this instance, various provisions of Regulation No 1408/71 and the rules on free movement.

B – *Substance*

1. First question

25. By its first question, the referring court asks essentially whether, in accordance with Articles 13 and 14c of Regulation No 1408/71, a Member State can provide that the agent of a company subject to tax in that Member State (9) exercises an activity there even though the agent manages the company from abroad. Thus the first question seeks guidance on where an employed or self-

employed activity takes place, in accordance with the aforementioned provisions.

26. Articles 13 and 14c of Regulation No 1408/71 fall under Title II of that regulation which is entitled ‘Determination of the legislation applicable’. It is settled case-law that the provisions of Regulation No 1408/71 determining the applicable legislation form a complete system of conflict rules the effect of which is to divest the national legislatures of the power to determine the ambit and the conditions for the application of their national legislation on the subject so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned. (10)

27. The provisions of Title II of Regulation No 1408/71 are intended not only to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them but also to prevent the concurrent application of a number of national legislative systems and the complications which might ensue. (11)

28. The conflict rules established by Regulation No 1408/71 are mandatory for the Member States and the application of those rules depends solely on the objective situation of the worker concerned. (12)

29. In my view, given the mandatory nature of the rules in question and indeed the very purpose of Title II of Regulation No 1408/71, a Member State cannot unilaterally arrogate to itself the power to determine whether a worker is subject to its legislation by providing that that worker has carried out an activity in that Member State where such a determination does not correspond to the objective situation of the worker concerned and the mandatory rules for determining the applicable legislation.

30. As the Court stated in *Aldewereld*, (13) the applicable legislation is derived objectively from the provisions of Title II of Regulation No 1408/71, taking into account the factors connecting the particular situation with the legislation of the Member States. To find otherwise would, in my view, risk emptying Title II of Regulation No 1408/71 on the rules for the determination of the legislation applicable of any real purpose and effect, in particular if such an approach were to be adopted by a number of Member States.

31. In the case at hand, it would appear from the file before the Court that Mr Rombouts, in addition to acting as an agent for the Company, was self-employed in Portugal from November 2007 (although the Company maintains that this period of self-employment began in November 2005) and was employed or unemployed in Portugal from 1 January 2001 to July 2005.

32. Although the exact time when Mr Rombouts became self-employed in Portugal is subject to dispute, it is clear that upon becoming self-employed in Portugal, he was not subject to Belgian social security legislation in respect of his activity as an agent of the Company. (14) The dispute before the referring court relates essentially therefore to the periods in which Mr Rombouts was employed and unemployed in Portugal. In that regard, I consider that the referring court seeks guidance on the application of Articles 14c(b) (15) and 13(2)(b) (16) of Regulation No 1408/71 to Mr Rombouts’ activity as agent of the Company while resident in Portugal.

33. It would appear from the file before the Court, subject to verification by the referring court, that in the light of Mr Rombouts’ objective situation he effectively or concretely exercised his mandate as agent for the Company ‘in the territory of’ (17) Portugal. While the exercise of that mandate may have effects in Belgium as claimed by the Belgian Government, (18) those effects cannot however alter the objective situation of Mr Rombouts. Mr Rombouts’ objective situation is a question of fact which must be established on an individual basis by the referring court in conformity with Title II of Regulation No 1408/71, rather than on the basis of an irrebuttable

presumption established in advance and in the abstract by national legislation.

34. I therefore consider, in the light of both the purpose and clear wording of Article 13(2)(b) and Article 14c(b) of Regulation No 1408/71, which form part of the mandatory rules for determining the applicable legislation laid down in Title II of that regulation, that those provisions should be interpreted as precluding a Member State from treating 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, where such treatment does not correspond to the objective situation of the worker concerned and where that activity is effectively exercised in the territory of another Member State.

2. Second question

35. By its second question, the referring court asks the Court whether Article 21 TFEU precludes national legislation which provides an irrebuttable presumption such as that in question in the main proceedings.

36. In my view, Article 45 TFEU in relation to freedom of movement for workers and Article 49 TFEU in relation to the right of establishment rather than Article 21 TFEU are applicable to the facts of the main proceedings as outlined by the referring court in the order for reference. (19) Article 21 TFEU which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU and Article 49 TFEU. (20)

37. It is settled case-law that all of the provisions of the FEU Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. Consequently, Article 45 TFEU and Article 49 TFEU militate against any measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by EU nationals of the fundamental freedoms guaranteed by the Treaty. (21)

38. In the case in the main proceedings, it would appear, subject to verification by the referring court, that the presumption applicable pursuant to subparagraph 4 of Article 3(1) of Decree No 38 does not differentiate on grounds of the nationality of the agents concerned. However, it would appear that that provision of national law has the effect of placing agents of companies in Mr Rombouts’ situation, by reason of the fact they have exercised their right to free movement within the EU, at a disadvantage in comparison with agents who have not exercised such a right.

39. Firstly, while an agent who has exercised his right of free movement and manages a company from abroad is subject to an irrebuttable presumption that he pursues in Belgium a professional activity and is thus obliged to pay social security contributions there in respect of that activity, an agent who has not exercised the right of free movement can rebut the presumption following judgment 176/2004 of the Belgian Constitutional Court of 3 November 2004 and adduce evidence that he is not carrying on an activity as a self-employed person for the purpose of subparagraph 1 of Article 3(1) of Royal Decree No 38.

40. Secondly and more importantly, the operation of the irrebuttable presumption in question exposes agents of companies subject to Belgian tax and who effectively or concretely exercise their mandate as agents from another Member State to the risk of having to pay social security contributions in respect of the same activity in two Member States.

41. It is that very risk which the provisions of Title II of Regulation No 1408/71 seek to avert.

42. The Belgian Government states that the purpose of the national legislation in question and in particular the irrebuttable presumption is to prevent social security fraud in Belgium by means of artificial relocation. As a result of modern means of communications, the agents of companies are able to exercise from abroad their mandate in respect of profit-making companies located in Belgium. According to that government, by not declaring their income as agents to the Belgian tax administration and by stating that their mandate is not subject to remuneration, agents may avoid paying obligatory social security contributions as self-employed workers in Belgium.

43. While the objective of preventing social security fraud is a laudatory pursuit and must indeed be encouraged, particularly by coordinating or harmonising measures adopted pursuant to EU law, I consider that the irrebuttable presumption in question which seeks to prevent social security fraud in Belgium is wholly inapt to prevent such fraud in that Member State when company agents, due to their objective situation and the operation of the mandatory rules contained in Title II of Regulation No 1408/71, are subject to the social security system of another Member State.

44. There would appear therefore, subject to verification by the referring court of the facts and circumstances in the main proceedings and more specifically the objective situation of Mr Rombouts, to be no question of social security fraud in Belgium in respect of his activity as agent of the Company, which would appear to be exercised in the territory of Portugal.

45. I therefore consider that Article 45 TFEU and Article 49 TFEU should be interpreted as precluding the adoption by a Member State of legislation such as subparagraph 4 of Article 3(1) of Decree No 38 in so far as it does not allow a person who is resident in another Member State and who effectively manages from that other Member State a company which is liable to tax in the first Member State to adduce evidence that he effectively carries out that activity in the territory of that other Member State and thus rebut the presumption that he is covered by the social security scheme for self-employed persons of the first Member State.

VI – **Conclusion**

46. For the reasons given above, I consider that the questions referred by the Cour du travail de Bruxelles (Belgium) should be answered as follows:

– Article 13(2)(b) and Article 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, which form part of the mandatory rules for determining the applicable legislation laid down in Title II of that regulation, should be interpreted as precluding a Member State from treating 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, where such treatment does not correspond to the objective situation of the worker concerned and where that activity is effectively exercised in the territory of another Member State.

– Article 45 TFEU and Article 49 TFEU should be interpreted as precluding the adoption by a Member State of legislation such as subparagraph 4 of Article 3(1) of Decree No 38 of 27 July 1967 in so far as it does not allow a person who is resident in another Member State and who effectively manages from that other Member State a company which is liable to tax in the first Member State to adduce evidence that he effectively carries out that activity in the territory of that other Member State and thus rebut the presumption that he is covered by the social security

scheme for self-employed persons of the first Member State.

1 – Original language: English.

2 – OJ English Special Edition 1971(II), p. 416.

3 – OJ 1998 L 209, p. 1.

4 – *Moniteur belge*, 29 July 1967, p. 8071.

5 – *Monitor belge*, 12 December 1996, p. 31.018 (‘Royal Decree No 38’).

6 – Known at the relevant time as the Cour d’arbitrage (Arbitration Court).

7 – *Monitor belge*, 2 March 1971, p. 2613, and 5 April 2001, p. 11473.

8 – See point 36 below.

9 – See point 10 above.

10 – See to that effect, inter alia, Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 21, and Case 60/85 *Luijten* [1986] ECR 2365, paragraph 14.

11 – See, by analogy, Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 34.

12 – See Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 52.

13 – Case C-60/93 [1994] ECR I-2991, paragraph 20. As the Commission pointed out in its observations, while a Member State is free to define the terms ‘employed person’ and ‘self-employed person’ as referred to in Regulation No 1408/71, it may not decide whether those persons exercised their activities on its territory.

14 – Thus even in the event that his activity as agent of the Company were to be considered as a self-employed activity in Belgium, upon becoming self-employed in Portugal and in accordance with Article 14a(2) of Regulation No 1408/71, Mr Rombouts would be subject to Portuguese social security legislation (see Case C-340/94 *de Jaeck* [1997] ECR I-461, paragraph 11).

15 – According to Article 14c(b) of Regulation No 1408/71, in the cases mentioned in Annex VII thereto, a person who is employed in one Member State and self-employed in another Member State is subject simultaneously to the legislation of each of those States. He is therefore required to pay such contributions as may be required of him by the legislation of each State (Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 22).

16 – In accordance with Article 13(2)(b) of Regulation No 1408/71, a person who is self-employed in the territory of one Member State is to be subjected to the legislation of that State even if he resides in the territory of another Member State (see Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 64).

17 – See the wording of Articles 13(2)(b), 14c(b) and indeed 14a(2) of Regulation No 1408/71 which repeat that formula.

18 – The Belgian Government stressed the fact that the acts adopted by the Company’s agents have legal effects in Belgium. Thus, according to that government, the professional activity in question is exercised pursuant to Article 14c(b) of Regulation No 1408/71 in Belgium even if the

acts are submitted from another Member State (in this case Portugal) using modern means of communication. The Belgian Government notes, in addition, that the acts of Mr Rombouts are those of the Company itself.

19 – It is clear from the order for reference that Mr Rombouts left Belgium in order to reside in Portugal and that he was employed, unemployed and self-employed in the latter Member State.

20 – See, by analogy, Case C-3/08 *Leyman* [2009] ECR I-9085, paragraph 20 and the case-law cited.

21 – See Case C-212/06 *Gouvernement de la Communauté française and gouvernement wallon* [2008] ECR I-1683, paragraphs 44 and 45 and the case-law cited.