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Judgment of the Court (Fifth Chamber) of 30 January 1997. - E.J.M. de Jaeck v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Social security for migrant workers - Determination of the legislation applicable - Definition of employed and self-employed. - Case C-340/94.

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Keywords

1 Social security for migrant workers - Legislation applicable - Definition of employed and self-employed for the purposes of Articles 14a and 14c of Regulation No 1408/71 - Determination according to the social security legislation of the Member State in whose territory the activities are pursued - Those concepts not endowed with a Community meaning

(Council Regulation No 1408/71, Arts 14a and 14c)

2 Social security for migrant workers - Legislation applicable - Person employed in one Member State and self-employed in another Member State - Legislation of one of those Member States insuring against only some of the risks covered by social security - Whether permissible - Insured person working in that Member State for only part of the working week - Determination of the amount of contributions to be paid, without taking into account contributions paid in the other Member State - Whether permissible

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

Summary

3 For the purposes of Articles 14a and 14c of Title II of Regulation No 1408/71 relating to the determination of the legislation applicable, as amended and updated by Regulation No 2001/83, `employed' and `self-employed' are to be understood to 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.

Since the wording of Article 13(1) of the regulation indicates that Title II concerns, in particular, employed and self-employed persons as defined in Article 1(a) thereof, a logical and consistent interpretation of the scope ratione personae of the regulation and of the system of rules of conflict of laws which it establishes requires `employed' and `self-employed' in Title II of the regulation to be interpreted in the light of the definitions in Article 1(a) thereof. Whether a person is to be regarded as an employed or as a self-employed person for the purposes of that article depends on the national social security scheme to which he is affiliated, and only the definitions used by that scheme, which may differ from those used in employment law, must be applied.

That reference to the definitions in national social security laws is not precluded by the existence of a Community definition of `worker' for the purposes of Article 48 of the Treaty, since Regulation No 1408/71 contains no indication that the intention was to refer to that definition nor, having regard to its purpose of merely coordinating national social security laws, does it presuppose such a definition, unlike Article 48 of the Treaty, the subjects of which must be capable of being identified by Community law itself.

4 Where Article 14c(1)(b) of Regulation No 1408/71 is applicable, Community law does not preclude the legislation of one of the two Member States from insuring the person in question against only some of the risks covered by its social security scheme, provided that there is no discrimination in that regard between nationals of that State and nationals of the other Member States. It is for the legislation of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme.

Where that article applies, Community law does not preclude one of the two Member States from determining the amount of contributions to be paid by an insured person who works in that State for only part of the working week, without taking into account contributions which that person may pay in another Member State in respect of work performed there during the rest of the week. No provision of the regulation requires a Member State to take into account, in order to calculate the contributions which it levies on the part of the income obtained by an insured person on its territory, the fact that that person works in that State for only part of the working week.

Parties

In Case C-340/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

E.J.M de Jaeck

and

and

Staatssecretaris van Financiën

on the interpretation of Articles 14a 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT

(Fifth Chamber),

composed of: L. Sevón, President of the First Chamber, acting as President of the Fifth Chamber, D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by M. Patakia and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by M. Fierstra, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by P. Watson, Barrister; the Council of the European Union, represented by G. Houttuin, of its Legal Service, acting as Agent; and the Commission, represented by P. van Nuffel, at the hearing on 4 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1996,

gives the following

Judgment

Grounds

1 By judgment of 21 December 1994, received at the Court on 29 December 1994, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty several questions on the interpretation of Articles 14a 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, hereinafter `the regulation').

2 The questions were raised in proceedings between Mr de Jaeck and the Staatssecretaris van Financiën concerning payment of contributions to the Netherlands national insurance scheme.

3 In 1984 Mr de Jaeck, a Belgian national, worked in two capacities: he was self-employed in Belgium, where he resided, and he was the director of, and sole shareholder in, a limited company in the Netherlands at which he was present generally two days a week. In respect of the latter activity he was required to pay contributions to the Netherlands national insurance scheme.

4 Mr de Jaeck claimed that he was not liable to contribute to that scheme and brought an action for recovery of the amount paid in that respect before the Gerechtshof (Regional Court of Appeal) 's Hertogenbosch, which recalculated and reduced his rate of contribution. However, it refused to allow his claim for the remainder of the amount on the ground that in accordance with the case-law of the Hoge Raad der Nederlanden the director of a limited company who is a major shareholder in that company is considered to be employed by that company both for income tax purposes and as regards liability to pay national insurance contributions. Accordingly, the Gerechtshof held that by virtue of Article 14c(1)(b) of the regulation, read in conjunction with Annex VII, Mr de Jaeck, who was employed in the Netherlands and self-employed in Belgium, was subject to the legislation of each of those States.

5 Mr de Jaeck brought an appeal in cassation before the Hoge Raad der Nederlanden. Referring to the case-law of the Centrale Raad van Beroep (Higher Social Security Court) Utrecht relating to employee insurance, according to which a director of a limited company who is also a major shareholder of the company cannot be regarded as an employee, he claimed, primarily, that since he was thus self-employed in both the Netherlands and Belgium, he should be subject only to the legislation of Belgium, his State of residence, in accordance with Article 14a(2) of the regulation.

6 In the alternative, he claimed that if he was nevertheless subject to Netherlands legislation in respect of his professional activities in the Netherlands, the calculation of his contributions should take into account the fact that he worked there only two days a week, pursuing for the rest of the week self-employment in Belgium in respect of which he was subject to Belgian legislation.

7 Taking the view that the outcome of the dispute depended on the interpretation of the regulation, the Hoge Raad der Nederlanden decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

`1. For the purposes of the application of Articles 14a and 14c of Regulation No 1408/71, is the expression "employed" to be interpreted as covering the employment relationship of a person managing, as an appointed remunerated director, a company with capital divided into shares, where that person is also a major shareholder of that company and can therefore exercise de facto power in the shareholders' meeting of the company?

2. If Question 1 is to be answered by reference to the national law of the Member State concerned, do the rules of Community law permit Article 14c of Regulation 1408/71 to be applied - as would result in this case from the application of Netherlands law - in such a way that a person as referred to in Question 1 is insured in respect of only some of the risks covered by the social security scheme of the Member State concerned - in this case those covered by national insurance (volksverzekering) - and is not regarded as an insured person with regard to the other risks covered by that scheme - in this case, those covered by employee insurance (werknemerverzekering) - and do they permit contributions to be levied on him accordingly?

3. If, as a result of the application of Article 14c(1)(b) of Regulation No 1408/71, the legislation of two Member States is applicable, do Community rules preclude national insurance contributions being levied by one Member State, under the legislation of that State, in connection with work performed - not on every working day each week - in that State, without regard to the possibility that contributions may be levied under the legislation of the other Member State in connection with work performed in that other State during the other working days each week, and if so, to what extent is that the case?'

The first question

8 By its first question, the national court seeks to ascertain whether the activity in the Netherlands of a person in Mr de Jaeck's situation constitutes employment or self-employment for the purposes of Articles 14a and 14c of the regulation. That question raises the more general issue of the interpretation of the terms `employed' and `self-employed' in Title II of the regulation, concerning the determination of the legislation applicable.

9 The scope ratione personae of the regulation is defined in Article 2 of the general provisions in Title I. According to Article 2(1), the regulation applies, in particular, `to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States'.

10 The terms `employed person' and `self-employed person' used by that provision are defined in Article 1(a) of the regulation. They refer to any person who is insured, whether as an employed or as a self-employed person, under one of the social security schemes referred to in Article 1(a).

11 Article 13(1), the first article in Title II of the regulation, which concerns the determination of the legislation applicable, provides that, subject to Article 14c, persons to whom the regulation applies are to be subject to the legislation of a single Member State only. Thus, according to Article 14a(2) of the regulation, a person who is normally self-employed in the territory of two or more Member States is to be subject to the legislation of the Member State in whose territory he resides.

12 Article 14c(1)(b) provides, however, that, in the cases mentioned in Annex VII, persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State are subject to the legislation of each of those States as regards the activity pursued in its territory. Point 1 of Annex VII refers to persons who are self-employed in Belgium and gainfully employed in any other Member State, except Luxembourg.

13 Thus, the provisions of Title II, unlike those of Title I, refer not to employed or self-employed persons (`travailleurs salariés'/`non-salariés') but to persons who are employed (or engaged in paid employment) and persons who are self-employed (`personnes qui exercent une activité salariée'/`non-salariée'). However, the two latter concepts are not defined by the regulation.

14 The Commission and the United Kingdom Government contend that `employed' and `self-employed' for the purposes of Title II of the regulation should be understood as meaning activities which are regarded as such for the purposes of the social security legislation of the Member State in which those activities are pursued.

15 The Commission emphasizes that that interpretation, which is based on the definitions of `employed person' and `self-employed person' in Article 1(a) of the regulation, guarantees consistency between Article 2(1) and Title II of the regulation by ensuring that the conflict rules which the latter provides are applicable to any person falling within its scope.

16 The Netherlands Government takes a different approach: relying on the difference in the [Dutch] terms used in Article 2(1) and Title II of the Regulation, it claims that `employed' and `self-

employed' should be given a uniform interpretation by reference to Articles 48 and 52 of the EC Treaty, as the Court itself held in Case C-71/93 Van Poucke v Rijksinstituut voor de Sociale Verzekering der Zelfstandigen [1994] ECR I-1101).

17 It is settled case-law that in interpreting a provision of Community law it is necessary to consider not only its wording but also, where appropriate, the context in which it occurs and the objects of the rules of which it is part (see, in particular, Case 292/82 Merck v Hauptzollamt Hamburg-Jonas [1983] ECR 3781, paragraph 12).

18 Article 51 of the EC Treaty, which the regulation implements, provides for the coordination, not the harmonization, of the legislations of the Member States. Substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working there, are therefore unaffected by that provision (see, in particular, Case 41/84 Pinna v Caisse d'Allocations Familiales de la Savoie [1986] ECR 1, paragraph 20).

19 So, in order to define the persons who may rely upon the provisions on the coordination of the national social security schemes which it establishes, the regulation refers to persons who are insured under those schemes. Articles 1(a) and 2(1) together provide that the regulation is applicable to employed or self-employed persons who are or have been subject to the legislation of one or more Member States, and employed or self-employed persons must be understood as meaning persons who are insured as one or the other under a social security scheme. Thus, as the Commission rightly pointed out, the terms `employed person' and `self-employed person' in the regulation refer to the definitions given them by Member States' social security legislation, regardless of the nature of the activity for the purposes of employment law.

20 Article 13(1) of the regulation, which concerns the determination of the legislation applicable, further provides that, subject to Article 14c, `persons to whom (the) regulation applies' are to be subject to the legislation of a single Member State only, such legislation being determined in accordance with the provisions of Title II.

21 The wording of that provision indicates that Title II concerns, in particular, the employed and self-employed persons to whom Article 2(1) of the regulation refers, as defined in Article 1(a) thereof.

22 In those circumstances, although the provisions of Title II refer expressly to `persons who are employed' (or `engaged in paid employment') (`personnes qui exercent une activité salariée') or who are `self-employed' (`personnes qui exercent une activité non-salariée') rather than to `employed' or `self-employed persons' (`travailleurs salariés'/`non-salariés'), a logical and consistent interpretation of the scope ratione personae of the regulation and of the system of rules of conflict of laws which it establishes requires the terms in question of Title II to be interpreted in the light of the definitions in Article 1(a) of the regulation.

23 Accordingly, just as the description `employed person' or `self-employed person' for the purposes of Articles 1(a) and 2(1) of the regulation depends on the national social security scheme under which the person is insured, `a person who is employed' (or `engaged in paid employment') and `a person who is self-employed' for the purposes of Title II of the regulation should be understood to refer to activities deemed such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued.

24 That interpretation is not affected by the arguments submitted by the Netherlands Government in support of the view that the expression `a person employed' (or `engaged in paid employment') in Title II of the regulation corresponds to the definition of a worker for the purposes of Article 48 of the Treaty provided by the case-law of the Court of Justice.

25 The Court has held that the term `worker' as used in the Treaty, and in particular in Article 48, is not to be defined by reference to the national laws of the Member States but has a Community meaning. Were it otherwise, the application of the Community rules on freedom of movement for workers might be jeopardized, since the meaning of the term could be decided upon and modified unilaterally, without any control by the Community institutions, by the Member States, which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty (see, in particular, Case 105/84 Foreningen af Arbejdsledere i Danmark v Danmols Inventar [1985] ECR 2639, paragraph 24).

26 Consequently, the Court considered that the term `worker' must be defined in accordance with the objective criteria which characterize the employment relationship, taking into account the rights and duties of the persons concerned, the essential characteristic of the employment relationship being that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, most recently, Case C-107/94 Asscher v Staatssecretaris van Financiën [1996] ECR I-3089, paragraph 25).

27 In the present case, the purpose of the provisions of Title II of the regulation is not to confer on the persons to which it refers special rights which, in certain circumstances, the Member States may deny them. As the Court has held in regard to Article 13(2)(a), those provisions are solely intended to determine the national legislation applicable and not to define the conditions creating the right or the obligation to become affiliated to a social security scheme (Case C-2/89 Kits van Heijningen [1990] ECR I-1755, paragraph 19).

28 Consequently, in the absence of any indication to the contrary in the regulation, it cannot be presumed that for the purposes of applying the provisions determining the national legislation applicable the Community legislature intended to endow the terms `employed' and `self-employed' with an autonomous Community meaning, based on employment law, especially since those provisions form part of a regulation whose purpose is merely to coordinate the social security legislation of the Member States.

29 In addition, as the Commission has correctly submitted, the interpretation favoured by the Netherlands Government would have the disadvantage that in certain cases persons insured as employed or self-employed persons under a national social security scheme, and so falling within the scope ratione personae of the regulation, could not have the conflict rules of Title II applied to them because they did not fall within the scope of Article 48 or Article 52 of the Treaty. This would be the case, for example, where an insured person pursues a professional or trade activity on such a small scale that it is to be regarded as purely marginal and ancillary (Case 53/81 Levin v Staatssecretaris van Justitie [1982] ECR 1035, paragraph 17, and Asscher, paragraph 25).

30 It is true that according to the case-law of the Court the provisions of Title II of the regulation govern only the situations to which they refer, and a person who falls within the personal scope of the regulation may not be in one of those situations (see, in particular, Case C-245/88 Daalmeijer v Bestuur van de Sociale Verzekeringsbank [1991] ECR I-555, paragraphs 11 and 12). The proper application of the regulation nevertheless demands that as far as possible its provisions concerning the scope of its application ratione personae and those concerning the determination of the legislation applicable should be interpreted coherently.

31 The Netherlands Government also claims that interpretation by analogy of the terms used in Article 1(a) and those used by Title II of the regulation is precluded by the difference in the terms used. It follows, moreover, from Van Poucke that the persons to whom Title II refers are necessarily the same as the persons referred to in Articles 48 and 52 of the Treaty.

32 As regards the first point, the Commission has correctly pointed out in reply to a written question of the Court that the status of employed person or self-employed person for the purposes

of the application of the regulation can be definitely established only when the legislation applicable has been determined. It is therefore logical that Title II of the regulation, whose purpose is precisely to determine that legislation, should avoid using those terms and refer, more generally, to persons who are employed (or engaged in paid employment) (`personnes qui exercent une activité salariée') or self-employed (`personnes qui exercent une activité non-salariée'). In that regard, although it is true that those terms may, in certain cases, lead to confusion, as they do here, it is nevertheless true that in the majority of cases the nature of the activity pursued by an insured person corresponds to his affiliation to a social security scheme as an employed or self-employed person.

33 As to the second point, it is true that in Van Poucke the Court applied the concept of `worker' for the purposes of Article 48 of the Treaty in order to ascertain whether an activity pursued as a civil servant by a person falling within the scope of the regulation constituted employment for the purposes of Article 14c of the regulation. However, in that case the Court had to deal with a question of interpretation which was specific to Title II of the regulation. Mr Van Poucke was employed as a civil servant in a Member State and was also self-employed in another Member State. While Article 13(2) of the regulation, which applies to a single professional activity, draws a distinction between civil servants and persons who are employed or self-employed, Article 14c, which is applicable where there are two or more activities of a different nature, is concerned solely with persons employed in one Member State and self-employed in another, without an express reference to civil servants. It is in those specific circumstances that the Court held that within the scheme of the Treaty civil servants are regarded as `employed' persons. In any event, it adopted that approach only after it had verified that it did not conflict with the express provisions of Articles 13 and 14 of the regulation.

34 In the light of those considerations the reply to the first question put by the national court should therefore be that for the purposes of Articles 14a and 14c of the regulation, `employed' and `self-employed' should be understood to 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.

The second question

35 By its second question the Hoge Raad seeks to ascertain whether, if Article 14c(1)(b) is applicable, Community law precludes the legislation of one of the two Member States from insuring the person in question against only some of the risks covered by its social security scheme.

36 It is settled case-law that it is for the legislation of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme, provided that there is no discrimination in that regard between nationals of the host State and nationals of the other Member States (see, in particular, Case 110/79 Coonan v Insurance Officer [1980] ECR 1445, paragraph 12, and Daalmeijer, paragraph 15).

37 The answer to the second question must therefore be that where Article 14c(1)(b) of the regulation is applicable, Community law does not preclude the legislation of one of the two Member States from insuring the person in question against only some of the risks covered by its social security scheme, provided that there is no discrimination in that regard between nationals of that State and nationals of the other Member States.

The third question

38 By its third question the Hoge Raad seeks to ascertain whether, in the event that Article 14c(1)(b) of the regulation applies, Community law precludes one of the two Member States from

determining the amount of the contributions to be paid by an insured person who works in that State for only part of the working week, without taking account of the contributions which he may pay in another Member State in respect of work performed there during the rest of the week.

39 As the Court has pointed out in paragraph 12 of this judgment, according to Article 14c(1)(b) of the regulation, in the cases referred to in Annex VII 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.

40 However, as the Netherlands Government and the Commission have correctly observed, each of the Member States concerned can levy contributions only on the part of the income obtained in its territory. Article 14c(1)(b) of the regulation provides that in the cases referred to in Annex VII the legislation of each State shall apply only in regard to the activity pursued on its territory.

41 That being the case, no provision of the regulation requires a Member State to take into account, in order to calculate the contributions which it levies on the part of the income obtained by an insured person on its territory, the fact that that person works in that State for only part of the working week.

42 The answer to the third question must therefore be that, where Article 14c(1)(b) of the regulation applies, Community law does not preclude one of the two Member States from determining the amount of contributions to be paid by an insured person who works in that State for only part of the working week, without taking into account contributions which that person may pay in another Member State in respect of work performed there during the rest of the week.

Decision on costs

Costs

43 The costs incurred by the Netherlands and United Kingdom Governments and the Commission of the European Communities, 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 Hoge Raad der Nederlanden, by judgment of 21 December 1994, hereby rules:

1. For the purposes of Articles 14a and 14c of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, `employed' and `self-employed' should be understood to 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.

2. Where Article 14c(1)(b) of the regulation is applicable, Community law does not preclude the legislation of one of the two Member States from insuring the person in question against only some of the risks covered by its social security scheme, provided that there is no discrimination in that regard between nationals of that State and nationals of the other Member States.

3. Where Article 14c(1)(b) of the regulation applies, Community law does not preclude one of the two Member States from determining the amount of contributions to be paid by an insured person who works in that State for only part of the working week, without taking into account contributions which that person may pay in another Member State in respect of work performed there during the rest of the week.