SUMMARY

ECJ 27 September 2012, case C-137/11 (Partena ASBL - v - Les Tartes de Chaumont-Gistoux SA), Free movement, Social insurance

Facts

Belgian Royal Degree 38 provides that self-employed persons are covered by a compulsory social insurance scheme that is administered by 'Partena'. A self-employed person within the meaning of Royal Degree 38 is someone who pursues an occupational activity in Belgium. Paragraph 4 of Article 3(1) of the Royal Degree ('Paragraph 4') provides, "Persons designated as agents of a company or association which is liable to pay Belgian corporation tax [...] shall be irrebuttably presumed to pursue in Belgium a professional activity as self-employed persons". This irrebuttable presumption was the subject matter of a dispute involving Mr Rombouts and a company of which he was a 50% shareholder and a director. According to Royal Degree 38, this company, called Les Tartes de Chaumont-Gistoux SA ('Tartes de Chaumont'), was jointly liable for the payment of the social insurance contributions in question.In 1999, Mr Rombouts emigrated to Portugal. In 2001, he found a job there but in 1999 and 2000 he was not employed. In May 2008, Partena served an order on Mr Rombouts and Tartes de Chaumont. Initially, Partena demanded payment of over € 125,000 by way of social insurance contributions covering the period 1999-2007, but later this was reduced to about € 68,000.

National proceedings

Tartes de Chaumont disputed the payment order and brought legal proceedings. The court where he brought the proceedings referred questions to the ECJ. Essentially, the questions were whether Paragraph 4 complies with Article 18 EC [Editor: this is now, Article 21 TFEU] on free movement, as detailed in Regulation 1408/71 (now, Regulation

883/2004, Editor). Article 13(1) of Regulation 1408/71 provides that persons to whom the Regulation apply shall be subject to the social insurance legislation of a single Member State only. Article 13(2)(b) states that "a person who is self-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". Under this main rule, Mr Rombouts would be subject to Portuguese social insurance law only, and would therefore not need to pay Partena contributions. However, there are exceptions to the main rule. One such exception is "where a person is self-employed in Belgium and gainfully employed in another Member State". Partena claimed that this was the case, as Mr Rombouts was irrebuttably presumed to be self-employed in Belgium and was gainfully employed in Portugal.

ECJ's findings

1. The ECJ begins by rejecting the Belgian government's inadmissibility defence (§ 28-41).

2. The question at issue is how far a Member State may, for the purpose of cover by its social security scheme for self-employed persons, determine the location where the activity of the workers in question is deemed to take place. In this instance, can a director of a Belgian company, who manages that company from his home in Portugal, be said to be self-employed in Belgium? (§ 43-44).

3. The provisions of Regulation 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 (§ 46).

4. The first step is to determine the location of a person's professional activity. It is not until this location has been determined that that activity can be qualified as 'employed' or 'self-employed'. It is not for the Member State to determine said location; this is to be determined exclusively on the basis of EU law. If a Member State could determine where a person carries out his professional activity, that could lead to the cumulative application of different legislation to the same activity, which is precisely what Regulation 1408/71 aims to prevent (§ 52-54).

5. 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 those rules of which they are part. Thus, the concept of the 'location' of an activity is the place where the person concerned carries out the actions connected with that activity (§ 56-57).

6. By making the irrebuttable presumption that persons designated as agents of a company liable to pay Belgium corporation tax pursue a professional activity in Belgium, Paragraph 4 is liable to lead to a definition of 'location' that is contrary to EU law (§ 58).

7. It is true that the presumption at issue may prevent social security fraud by artificially relocating the activity of agents of Belgian companies. However, by making that presumption irrebuttably, Paragraph 4 goes further than is strictly necessary for attaining the legitimate objective of combatting fraud, since it acts as a general impediment to those persons' ability to prove that the location of their activity is actually in another Member State (§ 60).

Ruling

EU law, in particular Articles 13(2)(b) and 14c(b) of Council Regulation (EEC) No 1408/71 [...] precludes national legislation such as that at issue in the main proceedings insofar 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.

Creator: European Court of Justice (ECJ)
Verdict at: 2012-09-27
Case number: C-137/11