EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 13 September 2017, case C-570/15 (X), Free movement, Social insurance

<p>A Dutch employee who resides in Belgium and performs only 6.5% of his hours worked in Belgium (and the rest in the Netherlands), cannot be regarded as ‘normally’ pursuing an activity in two or more Member States. The special rule in Article 14(2)(b)(i) of Regulation No 1408/71, stating that a person normally 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, does not apply in this case.</p>

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Facts

In 2009, a Dutch employee residing in Belgium, worked for 1,872 hours as an account manager and manager of telecommunications for his employer in the Netherlands. Out of those 1,872 hours of work, he performed 121 hours in Belgium. This is approximately 6.5% of the total hours worked that year. It comprised 17 hours visiting clients and 104 hours working from home. Those activities were not carried out according to a set pattern and X’s employment contract did not contain any arrangement for working in Belgium. The employee performed the rest of his work, amounting to 1,751 hours, in the Netherlands. He spent this time either

working in the office, or visiting potential clients.

The dispute in the main proceedings between X and the Staatssecretaris van Financiën (State Secretary for Finance) concerns the assessment of income tax and social insurance contributions imposed for the tax year of 2009.

Legal background

Regulation (EEC) 1408/71 is applicable for determining which social security law should apply. Regulation No 1408/71 was repealed and replaced with effect from 1 May 2010 by Regulation (EC) No 883/2004, but remains applicable ratione temporis in this case.

The general conflict rule of Regulation No 1408/71, contained in Article 13(2)(a), points to the applicable legislation of the Member State of employment. However, Article 14(2)(b)(i) of the Regulation states that a person normally 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.[1] Therefore, if the activities pursued by Mr X in Belgium were disregarded, the general conflict rule contained in Article 13(2)(a) would apply, pointing to the applicable legislation of the Member State of employment (the Netherlands). If those activities were included in the assessment, Article 13(2)(a) would apply, resulting in the applicable legislation changing from the Netherlands to Belgium every time the work location switched from the Netherlands to Belgium, and vice versa. Alternatively, it could be considered that Mr X was normally employed in the territory of two Member States, the Netherlands and Belgium, and that therefore, based on the special rule in Article 14(2)(b)(i) of Regulation No 1408/71, only the legislation of the Member State of his residence (Belgium) applied to him.

National proceedings

The Regional Court of Appeal of ‘s-Hertogenbosch, in the Netherlands, in the appeal against the judgment of a district court, ruled that the work performed in Belgium in 2009 was merely occasional. It held that those activities should not be considered in determining which social security law applied and therefore, in accordance with Article 13(2)(a) of Regulation No 1408/71, Dutch law applied for the tax year of 2009. X appealed.

The Dutch Supreme Court decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling.

Questions put to the ECJ

What standard or standards should be used to assess which law is designated by Regulation No 1408/71 in the case of a worker residing in Belgium who performs the bulk of his work for

his Dutch employer in the Netherlands, and performs 6.5% of that work in Belgium in the year in question, at home and with clients, without there being a fixed pattern and without any agreement having been made with his employer with regard to the performance of the work in Belgium?

ECJ's findings

In essence, the question was whether Article 14(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person, such as X, must be considered to be normally employed in the territory of two Member States, within the meaning of that provision.

The ECJ found it apparent from Article 14(2)(b)(i) that its application is conditional on the person in question being normally employed in the territory of two or more Member States. In that regard, the fact that a person works in a Member State merely occasionally is not sufficient for the application of that provision.

In order to determine whether someone is normally employed in two or more Member States (or, conversely, whether they work merely occasionally in several Member States), regard must be had, in particular, to:

the duration of the periods of activity and the nature of the employment, as defined in the contractual documents; and

the actual work performed.

As regards assessing the activities carried out in two or more Member States, the ECJ referred to two prior judgments:

In Calle Grenzshop Andresen (C-425/93) the ECJ held that the situation of a worker residing in Member State 'A' and employed by an undertaking with a registered office in Member State 'B', who, in the course of that employment relationship, regularly, for 10 hours each week, pursued his activity partly in Member State 'A', fell within the ambit of Article 14(2)(b)(i).

In Zinnecker (C-121-92) the ECJ held that a person who pursues an activity as a self-employed person for approximately one half of his time in the territory of his residence and the other half in the territory of another Member State, is to be deemed normally self-employed in the territory of two Member States, within the meaning of Article 14a.

However, in the present case, the employment contract did not provide for X to carry out work in the territory of his Member State of residence. Moreover, out of all of the hours he worked during the year in question, only approximately 6.5% were performed in that Member State, mostly by working from home. In such circumstances, the ECJ did not consider that he habitually carried out significant activities in his Member State of residence. This finding was consistent with the system for regulating conflicts of laws provided for by the provisions in Title II of Regulation No 1408/71. Article 13(2)(a) makes it clear that derogation from the general rule of connection to the Member State of employment is only necessary in circumstances in which it is found that another connection is more appropriate.

To apply Article 14(2) in the case at hand would be inconsistent with the fact that the connection to the Member State of residence was a derogation and it would create a risk that the conflict rules contained in Title II of the Regulation would be circumvented. That provision implies that any employment activity exercised in the Member State of employee's residence must amount to a certain minimum, otherwise even negligible or occasional activity could activate the Article 14(2)(b)(i).

Ruling

Article 14(2)(b)(i) Regulation 1408/71 must be interpreted as meaning that a person, such as the one in question, who is employed by an employer established in of one Member State and who resides in another Member State where he carried out, over the course of the year, a part of his employment activity amounting to 6.5% of his hours, which were worked without such an arrangement having been agreed with his employer in advance, is not to be considered to be normally employed in the territory of two Member States, within the meaning of that provision.

1 Article 13(1)(a) of Regulation No 883/2004 modifies the conflict rule previously contained in Article 14(2)(b)(i) of Regulation No 1408/71 by introducing the requirement for a 'substantial' part of a person's activity to be pursued in the Member State of residence.

Creator: European Court of Justice (ECJ)
Verdict at: 2017-09-13

Case number: C-570/15 (X)