JUDGMENT OF THE COURT (Sixth Chamber)
13 October 1993 *

In Case C-121/92,

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

Staatssecretaris van Financiën

and

A. Zinnecker,

on the interpretation 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 their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981, extending to self-employed persons and members of their families Regulation No 1408/71 (OJ 1981 L 143, p. 1), subsequently consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco (President of Chamber), C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

* Language of the case: Dutch.

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— A. Zinnecker, represented by M. W. C. Feteris, of the firm of Coopers & Lybrand, tax consultants,

— the Netherlands Government, by B. R. Bot, Secretary General at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, B. Smulders, of its Legal Service, acting as Agents, and P. Altmaier, Administrator, as expert,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 4 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 22 April 1993,

gives the following

Judgment

1 By judgment of 8 April 1992, received at the Court on 15 April 1992, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation 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 their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation No 1408/71 (OJ 1981 L 143, p. 1), and subsequently consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) (hereinafter 'the Regulation').

2 Those questions were raised in the course of a dispute between the Staatssecretaris van Financiën (State Secretary for Finance) and Mr Zinnecker regarding a sum of HFL 3 407 which the Staatssecretaris van Financiën claimed from him by way of contributions to the general social insurance scheme.

3 It appears from the judgment making the reference that, in 1982, Mr Zinnecker, a German national, was resident in the Federal Republic of Germany and operated, on a self-employed basis, shops for the sale of foodstuffs as to approximately one half in the Netherlands and one half in Germany.

4 Throughout that period, Mr Zinnecker was not insured in Germany, either on a compulsory or on a voluntary basis. In fact, he had not made any declaration in that regard. Neither was he insured in the Netherlands, since he was not resident in that country.

5 Nevertheless, the competent Netherlands authorities sent Mr Zinnecker a demand for payment concerning the collection of contributions to the general social insurance scheme for the year 1982. Following a complaint by him, the sum claimed at the outset was reduced by the inspector of taxes to the abovementioned amount.

6 Following an application by Mr Zinnecker, the Gerechtshof (Regional Court of Appeal), 's Hertogenbosch annulled the inspector's decision and the demand in question.

7 The Netherlands Staatssecretaris van Financiën then appealed in cassation to the Hoge Raad der Nederlanden which, considering that the decision on the case depended on the interpretation of the Regulation, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. In the case of a person residing, in the second half of 1982, in Germany and carrying on activities as a self-employed person, in more or less equal proportions both in Germany — where he was not compulsorily insured under a social security scheme because he was not an employee, and also did not belong to a category assimilated thereto, and was also not insured on a voluntary basis — and in the Netherlands, must the question whether he was self-employed within the meaning of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, be answered on the basis of the definition of the concept of a self-employed person applicable to the Netherlands or that applicable to Germany under Article 1(a)(ii) of the Regulation in conjunction with the corresponding paragraph C (Germany) and I (Netherlands) of Annex I. I thereto?

2. If the reply to the first question must be that the definition applicable to Germany is not decisive on its own, but that the definition applicable to the Netherlands may also, or solely, be decisive, does the fact that under the Netherlands legislation a person as referred to in the first question is not covered by compulsory insurance because he is non-resident, render it impossible to deem Article 1(a)(ii), in conjunction with Annex I. I (Netherlands), applicable to him?

3. If the replies to Questions 1 and 2 are to the effect that the person referred to in the first question may be deemed to be self-employed solely on the basis of his

activities in the Netherlands, is it then nevertheless necessary for the purposes of Article 14a(2) of the Regulation also to take into consideration the activities carried on in Germany, which would result in the legislation of the latter State being applicable to the person concerned, or must solely the activities in the Netherlands be taken into consideration, which in accordance with Article 13(2)(b) would result in the Netherlands legislation being applicable to him?

4. If a person as referred to in the previous questions is subject to Netherlands legislation, which for present purposes provides for a system of national insurance to which solely residents are affiliated, does it follow from Article 13(2)(b) of the Regulation that such a person, although non-resident, must be deemed to be an insured person for the purposes of that system?

5. If Question 4 is answered in the affirmative:

Is the person referred to insured in the Netherlands solely during the period in which he carries on activities on Netherlands territory?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts, the Community provisions at issue, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first and second questions

9 By its first two questions, the national court essentially seeks to ascertain whether a German national who is resident in Germany and pursues an activity as a self-employed person as to approximately one half in that State and one half in the

Netherlands is to be deemed to rank among the persons covered by Regulation No 1408/71 where he is insured neither in the first State nor in the second, on the ground that the first State provides only voluntary retirement insurance for self-employed persons and that the person concerned has not made the necessary declaration for affiliation thereunder, while in the second Member State he does not fulfil the residence condition laid down by the national legislation.

10 The persons covered by the Regulation are set out in Article 2 thereof. According to Article 2(1), the Regulation applies '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'. For a national of a Member State to rank among the persons covered by the Regulation, it is therefore necessary for him to be or to have been subject to the social security scheme of one or more Member States. In this instance, it is enough for the self-employed person to be subject to one of the two relevant legal systems (the Netherlands one or the German one).

11 As regards the Netherlands legislation, it is apparent from the judgment making the reference that Mr Zinnecker was, throughout the same period, self-employed in the Netherlands and that he was not insured on a compulsory basis there, because he did not fulfil the residence condition required by the Netherlands legislation. The national court therefore essentially asks whether, none the less, Mr Zinnecker may be deemed to be a self-employed person falling within the scope of the *ratione personae* of the Regulation on the basis of the Netherlands legislation.

12 It must be stated in that respect that Annex I. I to the Regulation provides in relation to the Netherlands that any person pursuing an activity or occupation without a contract of employment is to be considered a self-employed person within the meaning of Article 1(a)(ii) of the Regulation. That provision does not therefore indicate that in order to have the status of a self-employed person, the person concerned must necessarily be resident in the Netherlands.

13 It follows that Mr Zinnecker, notwithstanding the fact that he does not fulfil the residence condition laid down by the Netherlands legislation, must be deemed to be a self-employed person falling within the scope *ratione personae* of the Regulation.

14 As a result of that finding, it is not necessary to consider whether Mr Zinnecker is also subject to the German legislation.

15 Consequently, the answer to the first and second questions must be that Regulation (EEC) No 1408/71 is to be interpreted as meaning that a German national who is resident in Germany and who pursues an activity as a self-employed person as to approximately one half in that Member State and one half in the Netherlands, is to be deemed to fall within the scope *ratione personae* of the Regulation.

The third question

16 By the third question the national court essentially seeks to determine which national legislation applies to a person in the abovementioned situation.

17 It should be pointed out in that regard that Article 14a of the Regulation, which lays down special rules applicable to persons, other than mariners, who are self-employed, provides, by way of exception to Article 13(2) of the Regulation, that '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'.

18 Consequently, the answer to the third question must be that, in circumstances such as those in the main proceedings, the legislation applicable is that of the Member State in which the self-employed person is resident.

19 Regard being had to the answers given to the first three questions, there is no need to reply to the fourth and fifth questions.

Costs

20 The costs incurred by the Netherlands Government and by 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 8 April 1992, hereby rules:

1. **Regulation (EEC) No 1408/71 is to be interpreted as meaning that a German national who is resident in Germany and who pursues an activity as a self-employed person as to approximately one half in that Member State and one half in the Netherlands falls within the scope *ratione personae* of the Regulation.**

2. **Article 14a of that Regulation must be interpreted as meaning that the legislation applicable to such a self-employed person is that of Germany.**

Mancini Diez de Velasco

Kakouris Schockweiler Kapteyn

Delivered in open court in Luxembourg on 13 October 1993.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber