JUDGMENT OF THE COURT (Second Chamber)
10 July 1986 *

In Case 79/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep [Court of last instance in social security matters] for a preliminary ruling in the proceedings pending before that court between

D. H. M. Segers, of Linden (Netherlands)

and

Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen

on the interpretation of Articles 52, 58, 60 and 66 of the EEC Treaty with regard to the obligation to provide sickness insurance under Netherlands social security legislation,

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, O. Due and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

after considering the observations submitted on behalf of

Mr Segers, by I. G. F. Cath, of the Amsterdam Bar,

the Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, by W. M. Levelt-Overmars, Head of the Legal Affairs — Social Security Division of the Gemeenschappelijk Administratiekantoor Asso-

* Language of the Case: Dutch.

ciation, Amsterdam, in the written procedure, and by W. W. Wijnbeek, acting as Agent, in the oral procedure,

the Commission of the European Communities, by A. Haagsma, a member of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 June 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 29 January 1985 which was received at the Court on 1 April 1985, the Centrale Raad van Beroep referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions, the first concerning the interpretation of Articles 52, 58, 60 and 66 of the EEC Treaty, and the second that of Article 3 of Regulation (EEC) No 1408/71 of the Council, with a view to determining whether it is compatible with those provisions to apply the Ziektewet [Netherlands law establishing a general sickness insurance scheme] in a way which results in a difference of treatment, as far as admission to the scheme is concerned, for a director of a company according to whether or not the company is incorporated under Netherlands law.

2 The questions were raised in connection with an action brought by Mr Segers, a Netherlands national and the director of a company incorporated under English law, against the refusal of the Netherlands authorities, specifically the Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [Banking, Insurance, Wholesale Trade and Professions' Association, hereinafter referred to as 'the Association'] to accord him sickness insurance benefits under the Ziektewet.

3 In April 1981 the private limited liability company Slenderose Limited, whose registered office is in London, was formed in accordance with English law. In June 1981 Mr Segers and his wife took over that company, each holding an equal number of shares. In July 1981 Mr Segers incorporated into Slenderose Limited as a subsidiary of that company his one-man business, Free Promotion International, whose registered office is in the Netherlands. At the same time, he became a director of Slenderose. In practice all of Slenderose's business is conducted by its subsidiary and solely in the Netherlands.

4 In July 1981, in order to obtain sickness insurance benefits, Mr Segers registered as sick with the Association. That body refused to grant him such benefits on the grounds that he had no employment contract with Slenderose and that consequently he was not subordinate to an employer. The Ziektewet provides, *inter alia*, that any person who is in a subordinate position in relation to another person, an employer, is insured.

5 Following the rejection by the court of first instance of his action against that decision, Mr Segers appealed to the Centrale Raad van Beroep. That court referred to its own decisions according to which the director of a company who himself holds 50% or more of the shares of that company must be deemed to work for that company in a position subordinate to it. The Association, however, contended before the national court that that case-law should apply only to directors of companies whose registered office was in the Netherlands and not to a company incorporated under foreign law.

6 The Centrale Raad van Beroep took the view that the Association's argument had some force and that an interpretation of Community law was required. It therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the principles of freedom of establishment within the EEC and freedom to provide services within the EEC — in particular the last sentence of Article 52 read with Article 58 of the EEC Treaty and the last sentence of Article 60

read with Article 66 of that Treaty — mean that, when deciding whether there is an insurance obligation under Netherlands social security legislation, Netherlands courts may not make any distinction between the director/major shareholder of a private company incorporated under Netherlands law and a director/major shareholder of a private company incorporated under the laws of another Member State, even if the foreign company clearly does not carry out any actual business in the other Member State concerned but carries on business only in the Netherlands?

(2) If that question must be answered in the negative, does Community social security law (in particular, Article 3 (1) of Regulation No 1408/71) or any other provision of Community law prohibit such a distinction?'

The first question

7 The first question seeks essentially to establish whether Articles 52 and 58 of the EEC Treaty and Articles 60 and 66 must be interpreted as meaning that the competent authorities of a Member State may not exclude the director of a foreign company from a national sickness insurance benefit scheme solely on the ground that the company in question was formed in accordance with the law of another Member State, where it also has its registered office, even though it does not conduct any business there.

8 Mr Segers considers that in view of the direct effect of the provisions of the EEC Treaty concerning freedom of establishment and in the light of the General Programmes of the Council for the abolition of restrictions on freedom of establishment and the freedom to provide services the competent national authorities must abolish national provisions restricting the right of directors of companies incorporated under foreign law to be admitted to sickness insurance schemes. He notes in addition that in this case the provisions of the Treaty concerning the freedom to provide services do not apply.

9 The Association considers that the provisions of the EEC Treaty concerning freedom of establishment and the freedom to provide services do not apply in this instance. In its view, those provisions do not require that companies formed in

accordance with the laws of other Member States be treated in the same way as those formed in accordance with Netherlands law. As far as admission to sickness insurance benefits is concerned, a difference of treatment as between the directors of a company incorporated under Netherlands law and those of a company incorporated under the law of another Member State cannot be regarded as unlawful discrimination since the two types of companies are not comparable. Any person who forms a company under Netherlands law is subject to the same conditions regarding insurance, irrespective of his nationality or his place of establishment. Similarly, persons who form a company under foreign law do so under identical conditions. Any person may form a company under Netherlands law or under foreign law, irrespective of his nationality or place of establishment. It is always open to the persons concerned to consider the advantages and disadvantages from the point of view of social security and tax, or any other advantages or disadvantages, of those two forms of company.

10 It also maintains that the difference in treatment in question is justified by the need to combat abuse and to ensure that the Netherlands social security legislation is properly implemented. It is necessary to ensure that directors do not elect to form a company under foreign law solely in order to circumvent the restrictions provided for in the Netherlands legislation concerning the formation of private limited companies. In addition, the Association draws attention to the difficulty of collecting social security contributions in other Member States.

11 The Commission takes the view that, by virtue of Article 52 of the EEC Treaty, a company formed in accordance with the law of another Member State is entitled to conduct its business in the Netherlands under the same conditions as those applying to companies formed under Netherlands law. Those conditions include *inter alia* the right to be affiliated to a specific social security scheme. The legal conditions for affiliation to such a scheme must be the same for employees of a foreign company as for employees of companies formed under the law of the Member State concerned. To refuse to apply to the director of a company formed in accordance with the law of another Member State social security legislation applying to the directors of companies formed in accordance with the law of the Member State concerned must therefore be regarded as contrary to the principle of freedom of establishment.

12 In order to reply to the question submitted it is necessary to consider in the first place Article 52 *et seq.* of the Treaty. In that respect it should be noted that Article 52 of the EEC Treaty is one of the fundamental provisions of the Community and has been directly applicable in the Member States since the expiry of the transitional period. By virtue of that provision, freedom of establishment for nationals of a Member State in the territory of another Member State includes *inter alia* the right to set up and manage undertakings, in particular companies within the meaning of the second paragraph of Article 58, under the same conditions as those laid down for its own nationals by the law of the country where such establishment is effected.

13 The question submitted to the Court concerns a case in which the refusal to grant benefits is based not on the nationality of the director but on the location of the registered office of the company which he directs. However, as far as companies are concerned, it should be recalled that according to the judgment of the Court of 28 January 1986 (Case 270/83 *Commission* v *France* [1986] ECR 273) the right of establishment includes, pursuant to Article 58 of the EEC Treaty, the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue their activities in another Member State through an agency, branch or subsidiary. With regard to companies, it should be noted that it is their registered office in the abovementioned sense that serves as the connecting factor with the legal system of a particular State, as does nationality in the case of natural persons.

14 In that respect the Court would observe that a company which has been formed in accordance with the law of another Member State and which conducts its business through an agency, branch or subsidiary in the Member State in which it seeks to establish itself cannot be deprived of the benefit of the rule set out above. As the Court has already stated, in its judgment of 28 January 1986, cited above, acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would deprive Article 58 of all meaning.

15 It is established that entitlement to reimbursement of sickness costs pertains to a person and not to a company. However, the requirement that a company formed in accordance with the law of another Member State must be accorded the same

treatment as national companies means that the employees of that company must have the right to be affiliated to a specific social security scheme. Discrimination against employees in connection with social security protection indirectly restricts the freedom of companies of another Member State to establish themselves through an agency, branch or subsidiary in the Member State concerned. That proposition is supported by the fact that according to the Council's General Programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p. 7), which provides useful guidance for the implementation of the relevant provisions of the Treaty (see judgments of 28 April 1977, Case 71/76 *Thieffry* [1977] ECR 765 and of 18 June 1985 in Case 197/84 *Steinhauser* [1985] ECR 1819), all provisions and administrative practices which 'deny or restrict the right to participate in social security schemes, in particular sickness . . . insurance schemes' are to be regarded as restrictions on the freedom of establishment.

16 As regards the doubt expressed by the national court concerning the significance of the fact that the English company clearly does not conduct business in the United Kingdom, it should be noted that for the application of the provisions on the right of establishment, Article 58 requires only that the companies be formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community. Provided that those requirements are satisfied, the fact that the company conducts its business through an agency, branch or subsidiary solely in another Member State is immaterial.

17 As regards the grounds put forward by the Association to justify its refusal, namely the need to combat possible abuse and to ensure the proper implementation of the national social security legislation, it should be noted that Article 56 of the EEC Treaty allows within certain limits special treatment for companies formed in accordance with the law of another Member State provided that that treatment is justified on grounds of public policy, public security or public health. Although the need to combat fraud may therefore justify a difference of treatment in certain circumstances, the refusal to accord a sickness benefit to a director of a company formed in accordance with the law of another Member State cannot constitute an appropriate measure in that respect.

18 The reply given to the first question is based on the provisions of the Treaty concerning the freedom of establishment. It is therefore not necessary to consider the provisions concerning the freedom to provide services.

19 In the light of all the foregoing considerations, the reply to the first question referred to the Court by the Centrale Raad van Beroep should be that the provisions of Articles 52 and 58 of the EEC Treaty must be interpreted as prohibiting the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company in question was formed in accordance with the law of another Member State, where it also has its registered office, even though it does not conduct any business there.

The second question

20 Since a reply to the second question was required only in the event of a negative reply to the first question, the second question has become devoid of purpose.

Costs

21 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties in the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in reply to the questions referred to it by the Centrale Raad van Beroep by order of 29 January 1985, hereby rules:

The provisions of Articles 52 and 58 of the EEC Treaty must be interpreted as prohibiting the competent authorities of a Member State from excluding a director of a company from a national sickness insurance benefit scheme solely on the ground that the company in question was formed in accordance with the law of another Member State, where it also has its registered office, even though it does not conduct any business there.

Bahlmann Due O'Higgins

Delivered in open court in Luxembourg on 10 July 1986.

P. Heim
Registrar

K. Bahlmann
President of the Second Chamber