JUDGMENT OF THE COURT (Sixth Chamber)

9 November 2000 *

In Case C-404/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesgerichtshof, Germany, for a preliminary ruling in the proceedings pending before that court between

Josef Plum

and

Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln,

on the interpretation of Articles 13(2)(a) and 14(1)(a) 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 (OJ 1983 L 230, p. 6),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln, by R. Nirk and N.J. Gross, Rechtsanwälte with right of audience before the Bundesgerichtshof,

— the German Government, by W.-D. Plessing, Ministerialrat at the Federal Ministry of Finance, and C.-D. Quassowski, Regierungsdirektor in that Ministry, acting as Agents,

— the Belgian Government, by A. Snoecx, Adviser in the Directorate-General for Legal Affairs of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and C. Chavance, Adviser on Foreign Affairs within that directorate, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, and S. Emídio de Almeida, a lawyer in the Directorate for Migration Services and Social Assistance in the Directorate-General for Consular Affairs and Portuguese Communities within the Ministry of Foreign Affairs, acting as Agents,

— the Government of the Principality of Liechtenstein, by C. Büchtel, Director of that Government's 'European Economic Area' Department, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, acting as Agent, assisted by C. Jacobs and R. Karpenstein, Rechtsanwälte, Hamburg,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2000,

gives the following

Judgment

1 By order of 29 October 1998, received at the Court on 16 November 1998, the Bundesgerichtshof (Federal Court of Justice) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions

concerning the interpretation of Articles 13(2)(a) and 14(1)(a) 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 (OJ 1983 L 230, p. 6) (hereinafter 'Regulation No 1408/71').

2 The two questions have been raised in proceedings between Mr Plum and the Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln (hereinafter 'the AOK Rheinland') concerning social security contributions which the AOK Rheinland required under the German social security system.

Community legislation

3 Title II of Regulation No 1408/71, which comprises Articles 13 to 17, contains rules determining the legislation applicable in matters of social security.

4 Article 13(2) of that regulation provides:

'Subject to Articles 14 to 17:

(a) a person 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 or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...'.

5 Article 14(1) of Regulation No 1408/71 provides:

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

1. (a) A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting;

...'.

The dispute in the main proceedings

6 Mr Plum owns two companies, Plum Bauträger- und Bauunternehmung GmbH and Plum Bauunternehmung GmbH, both of which operate in the construction sector and have their registered offices in Geilenkirchen, Germany.

7 In 1989 Mr Plum founded Aannemersbedrijf B3 Senator BV (hereinafter 'Senator'), a company incorporated under Netherlands law having its registered office in Heerlen, the Netherlands. His purpose in founding that company was to meet the increasing competition within Germany from Netherlands construction companies, whose labour and social costs are lower than those of German undertakings.

8 Over the course of subsequent years, Senator received all of its orders from Mr Plum's two German undertakings. It carried out building projects exclusively in Germany, using its own workers who were resident in the Netherlands or in Germany. The anticipated duration of each building project in no case exceeded 12 months.

9 At its place of registration, Senator maintained an office which was occupied by the lessor of the business premises, who was also a manager of that company. He answered telephone calls and received and dealt with the post himself or passed it on to be dealt with by Mr Plum's German undertakings. Senator's books were kept at that office and employment interviews were conducted there.

10 From 1989 until February 1993 Senator paid social insurance contributions to the AOK Rheinland. However, after the Netherlands finance authorities had requested payment of social security contributions from Senator, it ceased payment of contributions to the AOK Rheinland and instead paid its contributions in the Netherlands. Senator ceased trading at the end of 1994.

11 Since Mr Plum was guarantor of all liabilities which Senator might incur towards the AOK Rheinland, the latter requested Mr Plum to pay social security contributions totalling DEM 100 430.02, plus interest, for the period from March 1993 to April 1994. After the action brought by the AOK Rheinland against Mr Plum had been upheld at first instance and on appeal, Mr Plum

appealed on a point of law ('Revision') to the Bundesgerichtshof, before which he contends that he was liable to pay social insurance contributions only in the Netherlands, in accordance with Article 14(1)(a) of Regulation No 1408/71.

12 In its order for reference, the national court observes that the outcome of Mr Plum's action is linked to the question whether Senator's workers were covered by German or Netherlands social security legislation.

13 Since it formed the view that the answer to that question hinged on the interpretation of Articles 13(2)(a) and 14(1)(a) of Regulation No 1408/71, the Bundesgerichtshof decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) Is a person who is employed by an undertaking (a company in the form of a Besloten Vennootschap (private limited company) incorporated under Netherlands law) which has its registered office in one Member State (the Netherlands) and maintains an office there but performs its activities primarily in the territory of another Member State and in the past has performed them exclusively in the latter Member State (in this case, the carrying out of building projects in Germany) a person employed in the territory of the first Member State (Article 13(2)(a) of Regulation No 1408/71 in the version of 2 June 1983, OJ 1983 L 230, p. 8 et seq.)?

(2) If Question 1 is to be answered in the affirmative, is there a "posting" within the meaning of Article 14(1)(a) of Regulation No 1408/71 where a building contractor having its registered office in one Member State employs its employees primarily on building projects in another Member State and has

employed them exclusively there in the past over a number of years but the anticipated duration of each individual building project does not exceed 12 months?'

The first question

14 It should be borne in mind at the outset that Article 14(1)(a) of Regulation No 1408/71 constitutes an exception to the rule laid down in Article 13(2)(a) thereof, under which a worker is subject to the legislation of the Member State in the territory of which he is employed (Case C-202/97 *Fitzwilliam Technical Services* v *Bestuur van het Landelijk Instituut Sociale Verzekeringen* [2000] ECR I-883, paragraph 30).

15 While Articles 14 to 17 of Regulation No 1408/71 contain other exceptions to this rule on the State of employment, it appears from the order for reference that making Senator's workers subject to the social security legislation of the Member State in which that company has its registered office instead of the corresponding legislation of the Member State in which those workers actually work presupposes that the workers come under Article 14(1)(a) of Regulation No 1408/71.

16 Consequently, the first question submitted by the national court is asking essentially whether Article 14(1)(a) of Regulation No 1408/71 is to be interpreted as applying to workers of a construction company established in one Member State who are posted to carry out construction work in the territory of another Member State in which, apart from purely internal management activities, that undertaking performs all of its activities.

17 The AOK Rheinland, the German, Belgian, French, Netherlands and Portuguese Governments, the Government of the Principality of Liechtenstein and the Commission submit that, in such a situation, Article 14(1)(a) of the regulation is not applicable, since the undertaking in question does not carry out any significant economic activity in the Member State in which it is established. For that reason, in accordance with Article 13(2)(a) of Regulation No 1408/71, the employees of that undertaking come under the social security legislation of the Member State in which they actually work.

18 The Court would reiterate that, according to its settled case-law, the provisions of Title II of Regulation No 1408/71, of which Article 14 forms part, constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation (see, in particular, *Fitzwilliam Technical Services*, cited above, paragraph 20).

19 The purpose of Article 14(1)(a) of Regulation No 1408/71 is, in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established. It is aimed at overcoming obstacles likely to impede freedom of movement of workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings (Case 35/70 *Manpower* v *Caisse Primaire d'Assurance Maladie, Strasbourg* [1970] ECR 1251, paragraph 10, and *Fitzwilliam Technical Services*, paragraph 28).

20 As the Court held in paragraph 11 of its judgment in *Manpower*, cited above, in order to prevent an undertaking established in a Member State from being obliged to register its workers, normally subject to the social security legislation of that State, with the social security system of another Member State where they are sent to perform work of short duration — which would complicate exercise of freedom to provide services — Article 14(1)(a) of Regulation No 1408/71

allows the undertaking to keep its workers registered under the social security system of the first Member State if the undertaking observes the conditions governing that freedom to provide services (*Fitzwilliam Technical Services*, paragraph 29).

21 At paragraphs 33 and 45 of its judgment in *Fitzwilliam Technical Services*, the Court concluded from those considerations that, in order to benefit from the advantage afforded by Article 14(1)(a) of Regulation No 1408/71, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available to undertakings based in another Member State must normally carry on its activities in the first State, that is to say, it must habitually carry on significant activities there.

22 It follows that a construction company, established in one Member State, which sends its workers to the territory of another Member State in which it performs all its activities, with the exception of purely internal management activities, cannot rely on Article 14(1)(a) of Regulation No 1408/71.

23 The answer to the first question must therefore be that Article 14(1)(a) of Regulation No 1408/71 is to be interpreted as not applying to workers of a construction company established in one Member State who are posted to carry out construction work in the territory of another Member State in which, apart from purely internal management activities, that undertaking performs all its activities. In accordance with Article 13(2)(a) of Regulation No 1408/71, those workers are subject to the social security legislation of the Member State in whose territory they actually work.

The second question

24 In light of the answer to the first question, it is unnecessary to reply to the second question.

Costs

25 The costs incurred by the German, Belgian, French, Netherlands and Portuguese Governments, the Government of the Principality of Liechtenstein and the Commission, 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 29 October 1998, hereby rules:

Article 14(1)(a) 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, is to be interpreted as not applying to workers of a construction company established in one Member State who are posted to carry out construction work in the territory of another Member State in which, apart from purely internal management activities, that undertaking performs all its activities. In accordance with Article 13(2)(a) of Regulation No 1408/71, those workers are subject to the social security legislation of the Member State in whose territory they actually work.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber