Anonymised version

Case C-415/22

Request for a preliminary ruling

Date lodged:

20 June 2022

Referring court:

Tribunal du travail francophone de Bruxelles (Belgium)

Date of the decision to refer:

9 June 2022

Applicant:

JD

Defendant:

Acerta – Caisse d'assurances sociales ASBL

Institut national d'assurances sociales pour travailleurs indépendants (Inasti)

Belgian State

[…] […] […] […]
Date of delivery: […] […]
9 June 2022
[…]
[…]
Subject matter:
self-employed social
security contributions
[…]
[…]
[administrative references]

Tribunal du travail francophone de

Bruxelles (Brussels Labour Court (French-speaking), Belgium)

11th Chamber

Judgment

IN THE CASE:

JD, […]

residing at […] in […] TERVUREN,

applicant,

[…] [appointment of the representative *ad litem*];

v

1/ L'ASBL ACERTA – Caisse d'Assurances Sociales pour travailleurs indépendants (Social Security Fund for the Self-employed), […]

having its registered office at […] in […] BRUSSELS,

defendant in the opposition to the payment order,

[…] [appointment of the representative *ad litem*];

2/ L'Institut National d'Assurances Sociales pour Travailleurs Indépendants (National Social Security Institute for the Self-employed, […] 'INASTI'), […]

having its registered office at […] in […] BRUSSELS,

defendant,

[…] [appointment of the representative *ad litem*];

3/ THE BELGIAN STATE, represented by Frank Vandenbroucke, Deputy Prime Minister and Minister of Social Affairs and Public Health, […] and David Clarinval, Minister for the Self-Employed, SMEs and Agriculture, Institutional Reforms and Democratic Renewal […] [appointment of the representative *ad litem*];

* * * *

[…] [customary procedural formulation]

Having regard to the application received at the Registry of this court on 15 January 2021, which was brought by the applicant's legal counsel against his

automatic liability – despite being a European official (of British nationality) born on 4 October 1940, retired on 18 March 2006 – since 12 February 2007 under the Belgian social security scheme for self-employed persons for having worked, in Belgium:

- since February 2007, in the field of research and development in physical and natural sciences until June 2020,

- since March 2016, as Chairman of the management board of the non-profit association […] [name of association] until March 2020, and

- since October 2018, as President of the non-profit association […] [name of association] until October 2020;

[…]

[customary procedural formulation]

The applicant claims, in essence, that:

'…

> By its **judgment of 10 May 2017** (*Wenceslas de Lobkowicz* v *Ministère des Finances et des Comptes publics*, C-690/15), […] the Court of Justice confirmed that:
>
> (1) The Social security scheme for officials and servants of the European Union (SSEU) is of the same kind as the social security schemes covered by Regulation No 883/2004 in so far as it is **primary, compulsory and complete**, and
>
> (2) The principles established by the judgment in *de Ruyter* apply to servants of the European Union and (3) **consequently it is prohibited to render EU servants liable for social levies allocated to the financing of the social security scheme of a Member State …**

Being EXCLUSIVELY and COMPULSORILY subject to the social security and health insurance scheme specific to the European Union (SSEU), which provides him with complete social protection, the principle of a single social security scheme prohibited INASTI from affiliating the applicant '*by force*' to the Belgian social security scheme, from which he receives no benefit of any kind, be it contributory or non-contributory. **He has contributed over 13 years at an outright loss …'**;

The defendant,

- contends, first of all, <u>as a matter of law</u>, that 'the combination of a retirement pension and the pursuit of an occupational activity as a self-employed person which gives rise to the applicability of Royal Decree No 38 is permitted, provided

that, up to 31 December 2014, the professional income generated by that activity as a self-employed person does not exceed a specific threshold. Since 1 January 2015, persons aged 65 and over have been permitted to earn an unlimited amount of additional income.

(and that)

[The court should] rule that a retired European official who exercises a self-employed activity in Belgium and who is not liable to pay any social contributions would risk interfering with the equal treatment of officials of the European Union and [any] other official or self-employed or employed person in Belgium, since only European officials would be exempt from paying social security contributions for self-employed persons.

The social security contributions paid by pensioners who continue to pursue a self-employed activity beyond pensionable age, and therefore in addition to their status as pensioners, are solidarity contributions …';

- then states, in fact and in the alternative, that, in view of the letter […] dated 28 December 2020, which it then received, taking into account the five-year limitation period, the sum initially claimed of EUR 50 732.50 should be reduced to EUR 35 209.22;

The two co-defendants, for their part, state, in essence, that in accordance with Article 14 of the Protocol (No 7) on the Privileges and Immunities of the European Union (OJ 2012 C 326, pp. 266-272), the EU legislature is to lay down the scheme of social security benefits for officials and other servants of the European Union.

That is the purpose of the Staff Regulations established under Council Regulation No 31 (EEC), 11 (EAEC) of 18 December 1961 (OJ 1962 P 045, p. 1385), as amended many times since then ('the Staff Regulations').

Under Article 72(1) of the Staff Regulations, European officials in active service receive health care under the EU Joint Sickness Insurance Scheme ('JSIS'). They continue to benefit from them after they have ceased to hold office, in particular if they have remained in the service of the European Union until retirement age (Article 72(2) of the Staff Regulations) …

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, pp. 1-123) ('Regulation No 883/2004/EC') repealed Council Regulation (EEC) No 1408/71 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 (OJ 1971 L 149, p. 2) ('Regulation No 1408/71/EEC').

Under Article 11(l) of Regulation No 883/2004/EC, persons to whom the regulation applies (in particular any national of one of the Member States of the European Union) 'shall be subject to the legislation of a single Member State only' as determined in accordance with that regulation. That principle, known as the principle of a single social security scheme, had already been laid down in Article 13(1) of Regulation No 1408/71/EEC.

The case-law in that field may be summarised by reference to the judgment of the Court of Justice of 26 October 2016 in Case C-269/15 *Rijksdienst voor Pensioenen* v *Willem Hoogstad*, EU:C:2016:802 […], the following paragraphs of which should be cited:

That decision given under Regulation No 1408/71/EEC (Article 13(1)) may be applied under Regulation No 883/2004/EC (Article 11(1)) (see, for example and to that effect: judgment of the Court of Justice of 18 January 2018, *Jahin*, C-45/17, EU:C:2018:18) […], as the Court of Justice emphasised, EU officials 'are [not] covered … by Article 48 TFEU, which conferred on the Council the task of instituting a scheme allowing workers to overcome any obstacles which may arise for them from national rules in the field of social security, a task which the Council fulfilled by adopting Regulation No 1408/71 and, subsequently, Regulation No 883/2004' (see, to that effect, judgments of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraphs 41 and 42, and of 16 December 2004, *My*, C-293/03, EU:C:2004:821, paragraphs 34 to 37; confirmed by the judgment in *Lobkowicz*, paragraph 35).

It follows that neither Regulation No 883/2004/EC nor, in particular, Article 11(1) thereof, relating to the principle of a single social security scheme, are applicable to them.

The question then arose as to whether such a principle could nevertheless be applied by analogy to European officials under provisions of **EU** law.

[The Court] thus states first of all that 'the legal position of EU officials with regard to their social security obligations comes within the scope of EU law by reason of their employment by the European Union' (see paragraph 38 of the judgment).

That employment relationship had not existed, in the case of the applicant, since 2006, that is to say, before Belgium claimed the payment from him of social security contributions from 2007.

It follows that the application by analogy of the principle of a single social security scheme makes sense only where it is the *employment relationship* with the European Union that may be concerned and where it cannot be covered by a social security scheme other than that resulting from Article 14 of Protocol No 7 and the Staff Regulations.

In the present case, the application of the Belgian social security scheme (social regulations for self-employed persons) is not intended to concern or deal with the applicant's employment relationship with the European Union or, more generally, 'employment within an EU institution'. Indeed, the applicant no longer had any employment relationship with the European Union between 2007 and 2020.

The present case concerns the application, by analogy, therefore, of Article 11(3)(a) of Regulation No 883/2004, which provides for the application of the legislation of the place where the activity is pursued.

In the present case, it was indeed in Belgium that the applicant worked as a self-employed person from 2007 to 2020;

The applicant, for his part, submitting '… the statement issued by the Commission on 16 September 2020 and worded as follows:

"**The Joint Sickness Insurance Scheme (JSIS) is compulsory, valid for 24 hours out of 24 throughout the world (no country is excluded)** and shall reimburse the medical expenses incurred by its members, their spouses and their children, on account of sickness, hospitalisation, maternity or accident, within the limits and under the conditions laid down in Article 72 of the Staff Regulations of Officials of the European Union and in accordance with the subordinate rules applicable to the JSIS. The scheme shall ensure the immediate cover of pre-existing conditions, both for hospital care and for outpatient care. It also reimburses the costs of dental surgery, within the limits of the abovementioned rules" …', rightly replies to the defendant, inter alia, that '… The Court of Justice, by its **judgment of 10 May 2017** (*Wenceslas de Lobkowicz* v *Ministère des Finances et des Comptes publics*, C-690/15), ruled that:

"**EU officials are subject to the joint social security scheme of the EU institutions**, which, pursuant to Article 14 of the Protocol, is laid down by the European Parliament and the Council acting by means of regulations adopted under the ordinary legislative procedure and after consultation of the other institutions [paragraph 36].

The scheme of social benefits was introduced by the Staff Regulations which set out the rules applicable to EU officials under Title V thereof, which is headed "Emoluments and social security for officials", and, in particular, Chapters 2 and 3 thereof, which relate to social security benefits and pensions [paragraph 37].

Therefore, **the legal position of EU officials with regard to their social security obligations comes within the scope of EU law by reason of their employment by the European Union** (see, to that effect, judgment of 13 July 1983, *Forcheri*, 152/82, EU:C:1983:205, paragraph 9) [paragraph 38].

The requirement for Member States to observe EU law when exercising their power to organise their social security schemes, as noted in paragraph 34 above, **therefore extends to the rules governing the employment relationship**

between an EU official and the European Union, that is to say, the relevant provisions of the Protocol and of the Staff Regulations [paragraph 39].

In that respect, as observed by the Advocate General in point 72 of his Opinion, first of all, **the Protocol has the same legal value as the Treaties** (Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 161) [paragraph 40].

By analogy with Article 12 of the Protocol, which establishes, in respect of EU officials, a uniform tax for the benefit of the European Union on salaries, wages and emoluments paid by it and, consequently, provides for an exemption from national taxes on those amounts**, Article 14 of the Protocol, in that it confers on the EU institutions the power to establish the scheme of social security for their own civil servants, must be regarded as meaning that the compulsory affiliation of EU officials to a national social security scheme and the requirement for those officials to contribute to the funding of such a scheme are outside the jurisdiction of the Member States** [paragraph 41].

Secondly, **the Staff Regulations**, in so far as they **were established by Regulation No 259/68**, have all the characteristics listed in Article 288 TFEU, which stipulates that a regulation **has general application, is binding in its entirety and is directly applicable in all Member States. It follows that all Member States are also bound by the Staff Regulations** (see, to that effect, judgments of 20 October 1981, *Commission* v *Belgium*, 137/80, EU:C:1981:237, paragraphs 7 and 8; of 7 May 1987, *Commission* v *Belgium*, 186/85, EU:C:1987:208, paragraph 21; of 4 December 2003, *Kristiansen*, C-92/02, EU:C:2003:652, paragraph 32; and of 4 February 2015, *Melchior*, C-647/13, EU:C:2015:54, paragraph 22) [paragraph 42].

…

It follows from the foregoing that the European Union alone, and not the Member States, has competence to establish the rules applicable to EU officials in respect of their social security obligations [paragraph 44].

In fact, as observed by the Advocate General in point 76 of his Opinion, **Article 14 of the Protocol and the provisions of the Staff Regulations on social security for EU officials fulfil, in respect of those officials, a function that is similar to that which Article 13 of Regulation No 1408/71 and Article 11 of Regulation No 883/2004 fulfil, in that they prohibit any obligation on EU officials to contribute to several schemes in this field** [paragraph 45].

National legislation, …, which subjects **the income** of an EU official to contributions and social levies specifically allocated for the funding of the social security schemes of the Member State concerned, therefore infringes the exclusive competence of the European Union under Article 14 of the Protocol and the relevant provisions of the Staff Regulations, in particular those which prescribe

mandatory contributions to the funding of a social security scheme by EU officials [paragraph 46].[”]

...

As regards the Belgian State, in a judgment of 26 October 2016, the Court of Justice held to the same effect that:

…

“The completeness of that system of conflict rules has the effect of divesting the legislature of each Member State of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (judgments of 10 July 1986, *Luijten*, 60/85, EU:C:1986:307, paragraph 14, 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraph 54, and 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 35)” [paragraph 34].

“Hence, since Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2), amending Regulation No 1408/71, introduced point (f) into Article 13(2) of Regulation No 1408/71, the principle that only one legislation is to apply is also applicable to workers who have definitively ceased their professional activities” [paragraph 38].

…

In those circumstances, it must be held that the applicant’s membership of the Belgian social security scheme for self-employed persons has no legal basis.

For that reason, the defendants must be ordered to annul that membership with retroactive effect …’;

Moreover, [the] ‘practical guide (for) reimbursement of medical expenses [’] … states, on page 3 thereof: ‘Who are the beneficiaries of the JSIS?’: [‘]Members … Pensioners …’

Furthermore, according to the ‘commentaire article par article (du) Statut de la fonction publique de l’Union Européenne[’] by Valérie Giacobbo-Peyronnel, Brussels, Emile Bruylant (p. 284), Christophe Verdure wrote[:]

‘… **Concept of a member**. In the context of Article 72 of the Staff Regulations, the term ‘member’ is given a broad meaning. An official is automatically a member of the JSIS. He will continue to benefit from that cover, first, **after retirement, if he has remained in the service** of the European Union **until the age of that retirement** …’;

Finally, it appears from an examination of the European case-law relied on that a case such as that of the applicant appears not yet to have been envisaged;

Moreover, the questions of possible fault on the part of one, two or three co-defendants and, therefore, of the compensation of the applicant in addition to the reimbursement claimed above, as quantified[,] could, where applicable, be addressed only in the light of the answer received to the question referred – at the suggestion in the alternative common to the applicant and co-defendants – to the Court of Justice of the European Union for a preliminary ruling, on the basis of point (a) of the first paragraph and the second paragraph of Article 267 of the Treaty on the Functioning of the European Union, […]

ON THOSE GROUNDS,

THE COURT,

[…]

[…] [customary procedural formulation]

On the basis of point (a) of the first paragraph and the second paragraph of Article 267 of the Treaty on the Functioning of the European Union[,] asks the Court of Justice of the European Union for a preliminary ruling on the following question:

'Does the principle of EU law based on a single social security scheme applicable to workers, whether employed or self-employed, active or retired, preclude a Member State of residence from requiring, as in the present case, a retired official of the European Commission, who pursues an activity as a self-employed person, to be subject to its social security scheme and the payment of purely 'solidarity' social security contributions, where the retired official is subject to the compulsory social security scheme of the European Union and does not derive any benefits, be they contributory or non-contributory, from the national scheme to which he or she is subject by force?';

Invites the principal registrar to send it with the documents in the files of the parties to the principal registrar of the Court of Justice;

Stays its proceedings in the meantime;

[…]

Decision delivered by the 11th Chamber of the Tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium) […] [composition of the Chamber hearing the case]

[…]

in open court on 9 June 2022 […]