Opinion of Advocate General Mischo delivered on 27 June 2000

Edmund Thelen v Bundesanstalt für Arbeit

Reference for a preliminary ruling: Bundessozialgericht – Germany

Social security - Articles 6 and 7 of Regulation (EEC) No 1408/71 - Applicability of a convention between Member States on unemployment insurance

Case C-75/99

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Opinion of the Advocate-General

I - Legal background to the dispute

A - Community provisions

1. Under Article 6 of 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, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (the Regulation):

Social security conventions replaced by this Regulation subject to the provisions of Articles 7, 8 and 46(4) this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either:

(a) two or more Member States exclusively, or

(b) at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.

2. Articles 7 and 8 of the Regulation provide that it is not to affect certain international provisions and that Member States may conclude conventions with each other based on the principles and spirit of the Regulation. Article 46(4) lays down the conditions under which, so far as concerns old age, invalidity or survivors' pensions, the provisions of a multilateral social security convention referred to in Article 6(b) relate to those of the Regulation.

3. Chapter 6 of Title III of the Regulation, concerning unemployment benefits, contains the following provision:

Article 67

1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of a period of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in Article 71(1)(a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

- in the case of paragraph 1, periods of insurance,

- in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.

B - Bilateral stipulations

4. Under Article 7(1)(1) of the Convention on unemployment insurance concluded on 19 July 1978 between the Federal Republic of Germany and the Republic of Austria (the Convention):

[P]eriods of unemployment subject to compulsory insurance contributions which have been completed according to the legislation of the other signatory State will be taken into account in determining whether the qualifying

period has been completed and in determining the period of entitlement (benefit period), provided that the applicant is a national of the signatory State in which the right is asserted and habitually resides in the territory of that State.

C - National provisions

5. In Germany, under Paragraph 100 of the Arbeitsförderungsgesetz (Law on Employment Promotion, AFG), anyone who fulfils a set of conditions including those relating to the qualifying period, is entitled to unemployment benefit.

6. Those conditions derive from the combined provisions of the first sentence of Paragraph 104(1) and the first sentence of Paragraph 106(1) of the AFG, the effect of which is that in order to be entitled to the 156 days' unemployment benefit, a person must have been in an occupation subject to compulsory contributions within the meaning of Paragraph 168 of the same law during the reference period. Under Paragraph 104(2) and (3) of the AFG, the reference period, which is three years, immediately precedes the first day of the period of unemployment, from which date the other conditions entitling a person to register as seeking employment are fulfilled.

II - The dispute in the main proceedings

7. Between 1986 and 1996 Mr Thelen, a German national, lived in Austria where he was in an occupation subject to compulsory contributions to unemployment benefit from 18 July 1991 to 15 June 1993, from 1 December 1993 to 20 December 1993 and from 1 February 1994 to 31 January 1996. Following his divorce he settled with his daughter, of whom he had custody, in a house in Trier which he inherited from his parents, where, on 4 March 1996, he applied to the employment office for unemployment benefit. It subsequently became apparent that he was unemployed from 4 March to 31 July 1996 and it is to that period that the dispute in the main proceedings relates. His application was dismissed on the ground that he did not fulfil the required conditions for the qualifying period. Thereafter, his complaint, then his appeal before the Sozialgericht (Social Court) Trier were both dismissed.

8. On appeal, the Landessozialgericht Rheinland-Pfalz found that the periods of employment completed by Mr Thelen since 1 January 1994, the date of entry into force of the Agreement establishing the European Economic Area, as a result of which the regulation became applicable in Austria, were, in principle, not to be taken into account because the Regulation had replaced the Convention on that date and the conditions under Article 67(3) or Article 71 of the Regulation were not fulfilled. However, it considered that the periods of employment in question should be taken into account in accordance with Article 7 of the Convention, since Articles 48(2) (now, after amendment, Article 39(2) EC) and 51 of the EC Treaty (now, after amendment, Article 42 EC) do not allow workers to lose social security advantages conferred on them by a convention between Member States because of the entry into force of the Regulation. It therefore upheld the applicant's claim.

9. The defendant authority brought an appeal before the Bundessozialgericht in order to have that decision set aside and that court considered the question whether, notwithstanding the entry into force of the Regulation, it was possible to take into account provisions in the Convention under the conditions defined by the Court of Justice's case-law. It observed in particular that those judgments relate to pension schemes and that the conclusion reached in them cannot necessarily be transposed to an unemployment insurance scheme which displays particular characteristics with regard to the qualifying period.

10. Taking the view that the solution to the dispute therefore depended on the interpretation of Articles 6 and 7 of the Regulation, the Bundessozialgericht decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Are Articles 6 and 7 of Regulation (EEC) No 1408/71 to be interpreted as meaning that, because of the principle of freedom of movement for workers, they do not preclude the continuance in force of a convention concluded between States in the field of unemployment insurance which is more advantageous for the insured person, although in consequence of the reference period entitlement to unemployment insurance benefits can no longer be derived from the period before the entry into force of the Regulation?

III – Appraisal

11. All the parties which have made submissions share the referring court's view that Mr Thelen cannot rely on the provisions of Regulation No 1408/71 in order to obtain the benefits he is claiming.

12. They argue, quite rightly in my view, that it is apparent from Article 67(3) of that Regulation that in order to have account taken of periods of insurance completed in another Member State, a person seeking employment must have completed his last period of insurance in the Member State in which the benefits are being claimed, which is not the case in this instance.

13. However, unless the periods of insurance completed by Mr Thelen in Austria are taken into account, he does not fulfil the condition laid down by German law concerning the qualification period of 160 days, within a reference period of three years. The order for reference states that in the present case the reference period runs

from 4 March 1993 until 3 March 1996 and that during this period Mr Thelen did not belong to the German insurance scheme for 160 days.

14. It is true that under Article 71 of the Regulation it is possible for a worker to receive unemployment benefit paid by a different State from that in which he resides. However, it relates to different circumstances from those of the applicant in the main proceedings.

15. It follows, as noted by the referring court and the parties who have submitted observations, that Mr Thelen may rely only on the provisions of the Convention and in particular Article 7 thereof in order to obtain payment of the benefits he is claiming.

16. As stated both by the referring court and the parties, it follows from Article 6 of the Regulation that that regulation replaced the aforementioned German-Austrian bilateral Convention as from 1 January 1994, the date of entry into force of the agreement on the European Economic Area.

17. The Regulation makes no provision for the continued application of Article 7 of the Convention after the Regulation has entered into force. The exceptions to replacement for which the Regulation provides do not include Article 7 and are not relevant in this instance.

18. It must therefore be established whether it is possible to apply the bilateral convention in question not because it has been replaced by the Regulation but on the basis of the aforementioned case-law of the Court of Justice, according to which the provisions of the Treaty concerning the freedom of movement of workers give rise in some cases to an obligation to allow for the continuation of the effects of previous bilateral agreements replaced by the Regulation.

19. The Commission, on the one hand, and the German and Spanish Governments, on the other, interpret this point differently.

20. Thus, the Spanish Government argues that the existing case-law always concerned retirement or invalidity pensions in Germany. Those pensions are different in kind from the unemployment benefits at issue in the present case.

21. A particular feature of unemployment benefits is that they are immediate: the amount does not depend on the contribution period and they are designed to remedy a current situation, presumed to be temporary. There therefore appears to be no room here for the notion of an accrued right, which is fundamental in the case-law. By contrast, so far as concerns old age or invalidity, at a given time there is an accrued, full right to benefits calculated in particular by reference to the contribution period.

22. The German Government also takes the view that application of the relevant case-law of the Court presupposes that a right had been acquired before entry into force of the Regulation, which is not the case in this instance.

23. By contrast, the Commission argues that there is nothing in the case-law of the Court which implies that it applies only to old age or invalidity pensions. That case-law is based on the protection of legitimate expectations and the only criterion for its application is that a worker should have exercised his right to freedom of movement before the entry into force of the Regulation and the rule of replacement laid down by that regulation.

24. Furthermore, there is no reason to consider that the case-law in question applies only to benefits accrued over the long term, since in some Member States that would not be the case for old age or invalidity pensions.

25. I share that point of view.

26. It is apparent that the aforementioned case-law is designed to prevent a worker who has exercised his right to freedom of movement and acquired social security rights from being deprived of them by the entry into force of the Regulation and the replacement by it of the bilateral conventions under which the rights were acquired.

27. As the Court ruled in Rönfeldt, the provisions of the Regulation must be read in the light of the objective of Article 51 of the Treaty, on which it is based, namely to contribute to the establishment of the greatest possible measure of freedom of movement for migrant workers, one of the principles on which the Community is founded. The Court added that that objective would not be attained, if, as a result of exercising their right to freedom of movement, workers were to lose the advantages guaranteed to them in any event by the legislation of a single Member State, including the bilateral conventions incorporated within that legislation.

28. Applying those principles to the situation where a convention agreed prior to entry into force of the Regulation confers on workers greater advantages than those arising from Community legislation, the Court concluded that any other interpretation ... disregarding the provisions of conventions between Member States which entail greater advantages for workers than are available under Community provisions, would substantially restrict the scope of the aims pursued by Article 51, inasmuch as the worker exercising his right to freedom of movement would find himself in a less favourable position than if he had not availed himself of that right.

29. Accordingly, that case-law is a priori designed to apply in all situations where a worker, within the meaning of the Regulation, has accrued a right under a bilateral convention before that convention was replaced by the Regulation. Such a situation may very well arise in the case of benefits acquired at the end of a short qualification period, such as the unemployment benefits at issue, and does not necessarily mean that rights accrued over the long term must be concerned. It is sufficient for the period in question to have commenced before entry into force of the Regulation and for the benefits at issue to have been claimed subsequently.

30. The cases of Naranjo Arjona and Others and Grajera Rodríguez confirm that view. The Court of Justice applied its decision in Rönfeldt to those cases and therefore ruled out application of the provisions of the Regulation which replaced the previous convention, where, as in the present case, the amount of benefits at issue did not depend on the contribution period.

31. It would therefore appear that the nature of the benefits under consideration is not the determining factor for applying the case-law of the Court of Justice and that in principle that case-law may be applied to unemployment benefits.

32. Moreover, in the present case, even the parties submitting observations who consider that the case-law in question cannot be applied to a case of unemployment benefit do not dispute the fact that if Mr Thelen had worked in Austria continuously beyond 1 January 1994 and had then applied for unemployment benefit in Germany, the qualifying periods in Austria would have to have been taken into account and therefore the provisions of the Regulation would have to have been rejected in favour of those of the Convention. In fact, application of the Regulation in place and instead of the Convention would have deprived the worker of his right to unemployment benefit accrued during the qualifying period in Austria.

33. Nevertheless, as both the German and the Spanish Governments point out, there are difficulties in applying the aforementioned case-law to the present case. The question therefore arises as to whether, as those governments believe, they are insurmountable.

34. Firstly, the German and Spanish Governments observe that the case-law relating to the continuance of effects is applicable only in situations in which the legal positions have already been established before the Regulation entered into force. In particular, such was the case in Thévenon, in which the Court explicitly restricted the applicability of its case-law solely to workers who had already exercised their right to freedom of movement before the entry into force of the Regulation.

35. However, in the case in point Mr Thelen had not acquired any rights before 1 January 1994, the date on which the Regulation entered into force in the case of the Republic of Austria. In that respect, the German Government points out that, although at that time Mr Thelen was entitled to unemployment benefit on the basis of the provisions of the relevant bilateral convention, he lost that right by operation of the three year reference period prescribed by German law and not because of the entry into force of the Regulation.

36. The Spanish Government adds that in any event in the present case the condition laid down by the Thévenon judgment is not fulfilled because Mr Thelen exercised his right to freedom of movement before the entry into force of the Regulation. In fact, he did not have any occupation in Austria subject to compulsory contributions except until 20 December 1993 and as from 1 February 1994. Therefore there was an interruption of his exercise of the right to freedom of movement before the entry into force of the Regulation and a new exercise of that right after that date.

37. The Commission observes in that regard that the case-law of the Court does not distinguish between whether or not there has been an interruption in the exercise of the right of free movement where the exercise of that right began before the entry into force of the Regulation, as is the case for Mr Thelen.

38. It must in any event be pointed out that it is not apparent from the documents before the Court that there was an interruption by Mr Thelen of the exercise of his right to free movement, followed by a new exercise of that right. The fact that between December 1993 and February 1994 he did not pursue an occupation in Austria which was subject to an obligation to pay contributions does not necessarily mean that he returned to Germany before 1 January 1994 and then returned to Austria after that date.

39. Moreover, in its judgment in Kuusijärvi the Court held that the fact that at the time when the Regulation entered into force a worker was unemployed and therefore had no occupation subject to compulsory contributions does not preclude application of the case-law in question.

40. In any event, I take the view that there is no need to consider whether or not Mr Thelen's exercise of the right to freedom of movement was interrupted.

41. As I have stated, the case-law of the Court of Justice seeks to exempt legal positions previously acquired by the worker from the effects of the replacement of bilateral conventions by the Regulation.

42. It necessarily follows, and this is very clear from Thévenon, that the right to freedom of movement must have been exercised before the replacement, that is to say before the entry into force of the Regulation. In fact, a worker who has exercised his right to freedom of movement only after the entry into force of the Regulation, that is to say at a time when it had already replaced the convention, cannot claim to have suffered a loss of advantages arising from that convention. Furthermore, in exercising the right to freedom of movement a worker must have acquired rights which would be extinguished by virtue of the replacement.

43. However, that does not mean that at the time of entry into force of the Regulation, the worker must still be exercising his right to freedom of movement. The determining factor is knowing whether, at that time, the worker had already acquired rights under the bilateral convention, arising from the previous exercise of his right to freedom of movement. The Rönfeldt judgment, which concerned a worker who had already ended his migration before the entry into force of the Regulation, confirms that conclusion.

44. If rights have been acquired, the Court's case-law, based, as we have seen, on the need to give full effect to the provisions relating to the freedom of movement of workers by guaranteeing protection of those rights, can be applied whether or not the worker has continued to exercise his right to freedom of movement at the time of entry into force of the Regulation. The aim is to prevent the worker from finding himself in an unfavourable position compared to the situation which would have existed if he had not moved.

45. It should therefore be established whether Mr Thelen had acquired a right at the time of the entry into force of the Regulation.

46. In that respect, the German Government observes that on that date Mr Thelen had in fact acquired a right to unemployment benefit in Germany under the bilateral agreement but that he lost it again because of the conditions relating to the qualification period laid down by German legislation and not because of the entry into force of the Regulation.

47. In that respect, let me firstly point out that on that date Mr Thelen had in fact accumulated sufficient periods of insurance to be entitled to unemployment benefits in Germany under the bilateral convention.

48. It is true that because German law imposes a qualification period contained within a reference period which is determined from the date of commencement of unemployment, a worker may, merely by the operation of those provisions and without the entry into force of the Regulation having any effect in that respect, lose a right to benefits which he had obtained at a given time.

49. However, that is not the case in this instance. Only if it is not possible to take into account periods of insurance which he accumulated in Austria since the entry into force of the Regulation does Mr Thelen not fulfil the conditions for the qualification period laid down by the German legislation.

50. On the other hand, without the intervention of Regulation No 1408/71, the bilateral convention would have been applicable and, on the basis of its provisions, those periods of insurance would have been taken into account and Mr Thelen would have obtained the benefits claimed.

51. Accordingly, it is not only by virtue of the conditions laid down by German law with regard to the qualification period that Mr Thelen is not in a position to obtain the disputed benefits, but also because of the replacement of the previous bilateral convention by the Regulation.

52. However, the consideration that the entry into force of the Regulation results in less favourable treatment for the worker than continuance of the bilateral convention is not sufficient, of itself, to preclude application of the provisions of the Regulation, as the Court held in the Walder case.

53. As we have already seen, the disadvantage suffered by the worker must be capable of being interpreted as the loss of a right acquired prior to the entry into force of the Regulation.

54. However, the fact that insurance periods completed in Austria cannot be taken into account after the entry into force of the Regulation, cannot, by definition, amount to the loss of a previously accrued right.

55. Must one conclude therefrom that the circumstances of the present case preclude application of the abovementioned case-law of the Court of Justice?

56. I do not think so.

57. As the Commission quite rightly points out, this case does not concern only periods of insurance completed after the entry into force of the Regulation, since the reference period prescribed by the German legislation for establishing whether the conditions for the qualifying period have been fulfilled commences on 4 March 1993.

58. On that date, Mr Thelen was in the position of a worker who had exercised his right to freedom of movement before the entry into force of the Regulation and can reasonably expect that he should not, by virtue of the entry into force of the Regulation, be deprived of a right conferred on him by the Convention, that is to say a right to have periods of insurance completed in Austria taken into account for the purposes of granting unemployment benefit in Germany, under the same conditions as if they had been completed in Germany.

59. In circumstances such as those in issue, it is therefore appropriate to disregard the provisions of the Regulation and apply those of the bilateral convention.

60. In my view, the last argument put forward by the Spanish Government does not justify a different conclusion.

61. It argues that application of the provisions of the Convention instead of those of the Regulation fails to have regard to the cohesion of the Regulation, which would thus be divided into à la carte segments.

62. However, the annexes to the Regulation itself provide for the continuance of some provisions of bilateral conventions, including provisions of the convention at issue in the present case. It is therefore clear that the Community legislature did not take the view that it was incompatible with the full effect of the Regulation.

63. It remains for me to mention one final consideration, raised both by the referring court and the Commission. Does the fact that only German and Austrian nationals may rely on the provisions of the Convention constitute discrimination according to nationality?

64. It is true that, a priori, such a possibility cannot be ruled out.

65. However, the Commission points out that that question could only arise in exceptional cases and that it is not relevant to the case in point. Since Mr Thelen is a German national there is no need to reply to the question of what the position would be if he were not.

66. It should be pointed out that the present case relates to the question of whether a worker in a position such as that of Mr Thelen may rely on the rules of the Treaty concerning the freedom of movement of workers as well as on general principles of Community legislation such as the protection of legitimate expectations. It therefore concerns the scope of the rights which an individual worker can claim as protection in a specific case.

67. On the other hand, the case does not seek to cause the Convention to survive the entry into force of the Regulation and is therefore not concerned with the question whether a Member State could legitimately conclude a convention with another State, the provisions of which could be invoked only by nationals of the parties to that convention. Moreover, in any event, the reply to that question could not deprive Mr Thelen of rights which Community legislation acknowledges to be worthy of protection, but instead would call for an examination of the problem of whether a worker who is a national of another Member State, placed in an identical situation, should not also benefit from that bilateral convention.

68. Accordingly, in the case in point, there is no need to decide whether the inability (as appears to follow from the wording of the Convention) of a worker who is a national of a Member State other than the Federal Republic of Germany to rely on the same provisions as Mr Thelen constitutes discrimination contrary to Article 6 of the EC Treaty (now, after amendment, Article 12 EC).

Conclusion

69. For the foregoing reasons, I propose that the following answer be given to the question referred by the Bundessozialgericht:

Articles 6 and 7 of 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, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, must be interpreted as meaning that they do not preclude the continued application of a convention concluded between States in the field of unemployment insurance which is more advantageous to the insured person, even though in consequence of the reference period entitlement to unemployment insurance benefits can no longer be derived from the period before the entry into force of the Regulation.