OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 16 DECEMBER 1981 [1]

Mr President,
Members of the Court,

1. The questions submitted and the factual background

The Luxembourg Code des Assurances Sociales [Social Insurance Code] provides that all workers who work in Luxembourg are in principle to be compulsorily insured for the purpose of obtaining an old-age or invalidity pension. Half of the contributions amounting to 12 % of the worker's wages must be paid by the employer and the other half by the worker.

The second paragraph of Article 174 of the Code provides that foreign workers who are only temporarily resident in Luxembourg may be exempted from having to pay the contributions. In the present case the French undertakings Seco SA and Desquenne & Giral SA obtained such an exemption for their workers in connection with the carrying out of work on the infrastructure of the Luxembourg railway network.

The third paragraph of Article 174 of the Code provides however that in such a case the employer none the less remains liable for his own share of the contributions.

The coordination of social security schemes by Regulation (EEC) No 1408/71 and through social security agreements with non-member countries required the Luxembourg social security institution in practice not to levy the employer's share of contributions in the case of workers from EEC countries or from the non-member countries in question.

However, from 1974 to 1977, the years to which the dispute related, the aforesaid French undertakings employed workers from non-member countries for which no social security agreement was in force. Consequently, in accordance with the third paragraph of Article 174 of the Code des Assurances Sociales, Seco and Desquenne & Giral had to pay their share of the contributions. It is not disputed that throughout the duration of the work carried out in Luxembourg the workers concerned continued to be compulsorily covered by the relevant French social security legislation. Nor is it disputed that they could not claim supplementary social security rights in Luxembourg in respect of old-age or invalidity. Both undertakings appealed against the decision of the competent Luxembourg social security institution (hereinafter referred to as "the Luxembourg institution"), on the ground that it was contrary to the provisions of the EEC Treaty on the freedom to provide services.

It is in the context of those disputes that the Cour de Cassation of the Grand Duchy of Luxembourg submitted the following questions to the Court:

1. Must the provisions of Article 60 of the Treaty of Rome be interpreted to mean that under its national law a Member State of the European Communities may require a foreign legal or natural person, who is a national of a member country of the Communities temporarily undertaking work in the first-named State and employing in that State workers who are nationals of States which have no

1 — Translated from the Dutch.

connection with the Community, to pay the employer's share of contributions to old-age and invalidity insurance just as it requires its own nationals to do, or is that requirement contrary to the aforesaid Community provisions, or to any other provisions, as constituting a discriminatory practice likely to prejudice the free movement of services, since the Community employer providing the service is obliged to pay *inter alia* the employer's share of contributions in respect of his foreign workers first in his country of origin and establishment and then again in the State in which he is temporarily performing services using foreign labour?

2. If the answer to Question 1 is to the effect that the practice described above in principle constitutes a prohibited discriminatory practice, will the outcome necessarily be the same, or may it be different, if the supplier of services in fact offsets the disadvantage of having to pay employer's contributions twice by other economic factors such as wages paid to his foreign labour force which are less than the minimum wage fixed in the country in which the services are provided or than the wages laid down by collective labour agreements in force in that country?

2. Written and oral observations

For a summary of the written observations submitted on these questions by the two French undertakings involved in the main proceedings, by the Luxembourg institution and by the Commission, I refer the Court to the report for the hearing. At the hearing counsel for the Luxembourg institution laid particular stress on his submission that Luxembourg could have completely refused to allow the non-Community workers employed by the French undertakings to enter Luxembourg or could have refused to grant them work permits.

During the hearing the Commission gave, at the Court's request, a brief summary of the situation concerning the problem of the "double" payment of employers' contributions in the other Member States. According to that summary France, Italy and the Netherlands have a system similar to Luxembourg's. However, under the legislation of Belgium, Germany, Greece, Ireland and the United Kingdom, and at any rate in the practice prevailing in Denmark, workers employed by undertakings from other Member States are exempt from social security contributions when carrying out temporary work, irrespective of their nationality. That exemption also applies to the employers themselves.

From its summary the Commission concluded that it is not only for the clarification of the relevant provisions of Community law in Luxembourg that the questions submitted are important.

3. The first question

The third paragraph of Article 60 of the EEC Treaty provides as follows:

"Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

The order for reference regards as possible discrimination within the meaning of that article the fact that, unlike a Luxembourg undertaking which employs workers from non-member

countries and pays contributions for them, an undertaking from another Member State which employs such workers and already pays contributions for them in that Member State is required to pay such contributions again in Luxembourg.

Unlike the Commission, I am of the opinion that the question submitted in this case can indeed be answered in the context of Article 60 of the EEC Treaty and that — in contrast, perhaps, to proceedings under Article 169 of the EEC Treaty — it is not necessary for the Court to base its answer partly or even solely on Article 59 of the EEC Treaty.

Since Luxembourg employers who have workers from non-member countries not covered by specific social security agreements are also liable for the contributions in question there is no question of any discrimination in form in this case. The question therefore resolves itself into two subsidiary questions: whether Article 60 of the EEC Treaty also applies to discrimination in substance and whether there is any question of discrimination in this case.

Like Article 52 of the EEC Treaty, Article 60 of the EEC Treaty may be regarded as a direct consequence of Article 6 of the Treaty. The Court has already held in the Italian refrigerator case (Case 13/63 *Italy* v *Commission* [1963] ECR 165) that Article 7 also prohibits discrimination in substance where different situations are treated identically.

The application of that principle in the context of the freedom to provide services is clearly restricted by Articles 57 (2) and 66 of the EEC Treaty. In my opinion it must be inferred from those provisions that restrictions on the freedom to provide services in other Member States which result from the application of the legislation of the country of establishment *in addition to* the legislation of the country in which the services are provided still do not as such constitute prohibited discrimination in substance. To my mind that reasoning is the basis of the Court's judgments in Case 16/78 *Choquet* [1978] ECR 2293 and Case 52/79 *Debauve* [1980] ECR 833. It does however follow from the Court's judgments in Case 36/74 *van Binsbergen* [1974] ECR 1299, Case 39/75 *Coenen* [1975] ECR 1547 and Case 52/79 *Debauve* [1980] ECR 833, so far as is here material, that the relevant provisions of national law of the country in which the services are provided must have their foundation in the general interest. Furthermore, those provisions must be objectively necessary, it must not be possible to replace them by less restrictive provisions and they must be applied in the same way to all services provided in the territory in question. In the judgment in the *Debauve* case just cited the Court added to this a proviso material to the present cases to the effect that such provisions are compatible with Community law only "to the extent to which a provider of services established in another Member State is not subject to similar regulations there". In fact a similar formula had already been used by the Court in its judgment in Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35. In view of Articles 57(2) and 66 of the EEC Treaty such a proviso in the Court's decisions must in my opinion be read restrictively as meaning that it applies only if the provisions in the country of establishment in fact afford substantially the same guarantees for the objectively justified general interest as the provision relied on in the country in which the services are provided. It is not sufficient in my

opinion that they deal with the same subject-matter. It may, however, be inferred from the Court's judgment in Case 71/76 *Thieffry* [1977] ECR 765 that substantial similarity between guarantees may be accepted notwithstanding slight differences between national provisions.

Therefore, in my opinion, it may in fact be inferred from the previous decisions of the Court to which I have referred that since the end of the transitional period Articles 59 and 60 of the EEC Treaty also prohibit discrimination in substance stemming from the equal treatment of situations which are not in fact the same. A Member State's own nationals are subject only to the legislation of the country in which the service is provided; on the other hand, nationals of another Member State are also subject to the legislation of the country in which they are established, whilst that legislation contains substantially the same guarantees respecting the general interest in question. It also seems to me to follow from the provisos I have cited from the *Wesemael* and *Debauve* judgments that in cases of this kind in which the legislation of the country in which the service is provided overlaps with that of the country of establishment, thus doubling the burden on the person providing the service, in principle priority must be conferred on the legislation of the country of establishment. It appears, however, from the Court's judgment in the *Koestler* case (Case 15/78 [1978] ECR 1971) that this principle of the priority of the legislation of the State of establishment should not lead to nationals of other Member States receiving more favourable treatment because the law of the country in which the service is provided is not applied. All the foregoing conclusions apply of course without prejudice to greater restrictions on the freedom of action of the Member States which may result from the coordination or harmonization of the provisions laid down by law, regulation or administrative action in Member States on the basis of Articles 57 and 66 of the EEC Treaty or on the basis of other similar provisions of the Treaty.

The second part of the question which now remains to be answered is the question whether the aforesaid conclusions also apply to overlapping obligations to pay contributions towards old-age and invalidity pensions such as in this case. That does not appear to be self-evident, in so far as all the judgments cited relate to provisions which affect the ability of persons to take up and pursue activities.

Nor is it possible to obtain clear guidance on this second part of the question from the General Programme for the abolition of restrictions on freedom to provide services, which was adopted on 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p. 3). Admittedly it is clear from the list of restrictive provisions which are to be repealed that these may also belong to the field of social security. Section A (g) of Title III of the General Programme mentions provisions which, in respect of foreign nationals only, "deny or restrict the right to participate in social security schemes, in particular, in sickness, accident, invalidity or old-age insurance schemes, or the right to receive family allowances". Nevertheless that provision does not seem sufficient to bring the present case under Article 60 of the EEC Treaty. In the first place, to judge from the text of the relevant Luxembourg provision, it is not one which applies in respect of foreign nationals only. Secondly, the issue in this case is something entirely

different from restrictions on access to the Luxembourg social security scheme; rather it is a case of a *de facto* restriction on the provision of services due to the double payment of contributions.

The case rather appears to concern provisions or practices which, in respect of foreign nationals only, "make the provision of services more costly through taxation or other financial burdens" as referred to in Section A (e) of Title III of the General Programme. Since the Court's case-law also appears to prohibit discrimination in form in the circumstances previously mentioned, the charging of contributions which provide the workers concerned with no extra social security and are more onerous for employers who are also required to pay contributions in their country of establishment than for residents of the country in question could in my opinion be regarded as prohibited on the basis of the rationale of the aforesaid provision of the General Programme.

However, I believe that such a general conclusion needs to be qualified in some ways. The opening words of Title III of the General Programme contain an express proviso in respect of the exceptions or special provisions laid down in the Treaty, in particular "the provisions ... concerning taxation systems". In view of the fact that those provisions are grouped together with "the provisions concerning the free movement of goods, capital and persons", presumably only Articles 95 to 99 of the Treaty, which bear the title "Tax Provisions", are contemplated here. Nevertheless I would not rule out the possible inclusion of Article 220 of the EEC Treaty, which provides *inter alia* for the abolition of double taxation within the Community to be secured in separate negotiations. Because of Article 220 and considering the familiar complications of this problem, I would hesitate to consider that the question of the abolition of double taxation and double charging of contributions is in general capable of being resolved by means of Article 52 *et seq.* and Article 59 *et seq.* of the Treaty in so far as the occurrence of double taxation in the State of origin and the State in which the activity is pursued restricts self-employed persons in taking up or pursuing their activities.

I consider that the Court's previous decisions might nevertheless be of some limited assistance in resolving the general question of the abolition of double taxation in that wide sense of the term. Besides the above-mentioned criteria inferred from those decisions, I would like to mention in particular in this connection the absolute limit laid down in paragraph 15 of the *Coditel* judgment (Case 62/79 [1980] ECR 881) in which it was held that the application of national legislation which is otherwise permissible may not constitute "a means of arbitrary discrimination or a disguised restriction on trade between Member States". The requirement that employers from other Member States should pay contributions in cases such as this is unnecessary for the proper operation of the Luxembourg social security scheme and thus contrary to the principle of proportionality. The contributions charged do not provide the workers concerned with any extra social security. Moreover, it is an established fact that those workers have rights under, and are bound by, the French social security scheme. Therefore the charging of contributions in cases such as this constitutes a disguised restriction of the

freedom to provide services from other Member States, especially as according to the written and oral submissions of the Luxembourg institution it helps to offset a competitive advantage held by the foreign employer.

In the final analysis, therefore, I come to the following conclusion based on the Court's previous decisions:

Irrespective of the nationality of the workers concerned, it is contrary to the third paragraph of Article 60 of the EEC Treaty for a Member State to require an employer from another Member State to pay contributions without granting the workers concerned any increased social security, if that employer is required to pay similar contributions in respect of those workers in the country in which he is established and those contributions operate so as to provide the workers concerned with social security when they work in the first-mentioned State.

4. The second question

By its second question the Cour de Cassation of Luxembourg seeks to ascertain whether the answer to the first question would be different if the contributions charged in the country in which the services are provided are in fact offset by other economic factors such as payment of wages which are less than the minimum wage or that laid down by collective labour agreements in force in that country.

It seems clear to me that this second question must be answered in the negative.

It is one of the fundamental features of the Common Market, which is to be attained *inter alia* by the freedom to provide services, that when providing services in another Member State any employer may in principle make use of the cost advantages existing in his country, including lower wage costs, under the conditions of undistorted competition which constitute another objective of the Treaty. Where those cost advantages are based on measures or practices which are contrary to other Treaty provisions or to national provisions which are not contrary to Community law, they may be challenged only on the basis of those other provisions of Community or national law. For the rest, I do not consider it certain that the exercise in these circumstances of the right referred to by the Luxembourg institution to refuse to grant a work permit to the workers concerned would be in accordance with Article 60. However, that question has not been raised in this case, so I do not need to consider it further.