

JUDGMENT OF THE COURT (Third Chamber)

9 March 2006^{*}

In Case C-493/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te 's-Hertogenbosch (Netherlands), made by decision of 9 June 2004, received at the Court on 1 December 2004, in the proceedings

L.H. Piatkowski

v

Inspecteur van de Belastingdienst grote ondernemingen Eindhoven,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský (Rapporteur) and J.-P. Puissochet, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

^{*} Language of the case: Dutch.

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Netherlands Government, by H. Sevenster and C. Wissels, acting as Agents,
- the Commission of the European Communities, by D. Martin and P. van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2005,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 and 43 EC) and Article 14c (b) 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 and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as

amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1), ('Regulation No 1408/71').

- 2 The reference has been made in proceedings between Mr Piatkowski and the Inspector van de Belastingdienst grote ondernemingen Eindhoven (Head of the Eindhoven Taxation Office for Large Businesses, 'the Inspector'), concerning the determination of the basis for calculating the social security contributions payable by the applicant in the Netherlands.

Legal context

Community law

- 3 Article 13(1) of Regulation No 1408/71 provides:

'Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. ...'

- 4 Article 14c of that regulation lays down special rules applicable to persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State.

- 5 Under Article 14c(b), a person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State is to be subject, in the cases mentioned in Annex VII to that regulation, to the legislation of the Member State in the territory of which he is engaged in paid employment and to the legislation of the Member State in the territory of which he is self-employed.
- 6 Annex VII to Regulation No 1408/71 mentions among the instances in which a person is to be simultaneously subject to the legislation of two Member States, at point 1 of that annex, that of a person self-employed in Belgium and gainfully employed in any other Member State.

National law

- 7 Article 6(1)(b) of the Netherlands General law on old-age insurance (Algemene Ouderdomswet) provides that every non-resident subject to tax on income as an employee in the Netherlands is to be insured under the scheme provided by the Law. The same holds for the other laws on national insurance, namely the General law on family benefits (Algemene Kinderbijslagwet), the General law on survivors (Algemene Nabestaandenwet) and the General law on sickness insurance (Algemene Wet Bijzondere Ziektekosten).
- 8 The levy of social security contributions in the Netherlands is governed by the Law relating to the financing of social security (Wet financiering volksverzekeringen, 'the WFV').

9 Article 6 of the WFV provides:

‘The insured person is liable to pay national insurance contributions.’

10 Under Article 7 thereof:

‘The basis for calculation of the national insurance contributions shall be the contribution income of the person liable.’

11 Under Article 8 of the WFV, ‘contribution income’ is defined as the taxable income or the taxable domestic income for the purposes of the Netherlands Law on income tax (Wet op de inkomstenbelasting, ‘the WIB’).

12 Under Article 49(1)(c)(4) of the WIB, income arising out of debts due from a company established in the Netherlands constitutes ‘taxable domestic income’ if the recipient has a significant interest in that company for the purposes of Article 20(a) of that law and that interest does not belong to the assets of a company.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 In 1996 Mr Piatkowski, who has Netherlands nationality, became a resident of Belgium where he works as a company manager. For the purposes of Belgian social security legislation such work is deemed to be a self-employed activity.

- 14 The applicant also works as a director of the limited liability company, Vanderheide Beheer BV ('Vanderheide'), which is established in the Netherlands and is a wholly-owned subsidiary of a Belgian company, in which Mr Piatkowski and his wife each own 50% of the shares. In his capacity as director, for which he received a salary in 1998 subject to income tax in the Netherlands, he is deemed to be an employee for the purposes of Netherlands national insurance legislation.
- 15 Mr Piatkowski has a claim against DuvedeC BV, a company established in the Netherlands, 41% of whose share capital is held by Vanderheide. In 1998, Mr Piatkowski received a payment of interest ('the interest payment at issue') in respect of that claim, the amount of which was included in the determination of his contribution income for that year.
- 16 Mr Piatkowski contested the inclusion of that interest payment and lodged an objection with the Inspector. The relevant contribution was, however, confirmed by decision of 17 March 2000. Mr Piatkowski then appealed to the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch), contending *inter alia* that, under Regulation No 1408/71, it falls to the competent authorities of the Kingdom of Belgium, the State in which he is resident, to levy contributions on the interest payment at issue.
- 17 Since the Gerechtshof te 's-Hertogenbosch was uncertain as to whether the levy of the Netherlands national insurance contributions on the interest payment at issue was compatible with Community law, it decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Does Community law, in particular the right to freedom of movement and Article 14c(b) of Regulation No 1408/71 ... , preclude the Netherlands from levying national insurance contributions on interest income paid by a company established in the

Netherlands to a Belgian resident to whom under Article 14c(b), in conjunction with point 1 of Annex VII to Regulation No 1408/71, both Netherlands and Belgian social security legislation are applicable?’

The question referred for a preliminary ruling

18 It appears from the wording of the question referred, read in conjunction with the grounds of the decision to refer, that the *Gerechtshof te 's-Hertogenbosch* is essentially asking whether Article 48 of the Treaty, on freedom of movement for workers, Article 52 of the Treaty, on freedom of establishment, and Article 14c(b) of Regulation No 1408/71 are to be interpreted as precluding Netherlands legislation which includes, in the basis for calculating social security contributions, interest such as that paid, in the case in the main proceedings, by a company established in the Netherlands to a Netherlands national resident in Belgium who is subject, under that regulation and taking into account the nature of his occupational activities, to the social security legislation of both those Member States, where there is no clear criterion connecting that interest payment to the Member State in which the company is established.

19 As a preliminary point, it must be borne in mind that the objective of Regulation No 1408/71, as stated in the second and fourth recitals in the preamble, is to ensure free movement of employed and self-employed persons within the European Community, while respecting the special characteristics of national social security legislation. To that end, as is clear from the 5th, 6th and 10th recitals, that regulation upholds the principle of equality of treatment of workers under the various national legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement (see Case C-68/99 *Commission v Germany* [2001] ECR I-1865, paragraphs 22 and 23, and Case C-249/04 *Allard* [2005] ECR I-4535, paragraph 31).

- 20 The system put in place by Regulation No 1408/71 is merely a system of coordination, concerning inter alia, in Title II thereof, the determination of the legislation applicable to employed and self-employed workers who make use, under various circumstances, of their right to freedom of movement. It is inherent in such a system that the level of contributions to be paid in respect of the pursuit of the same activity will differ according to the Member State where that activity is wholly or partly pursued or according to the social security legislation to which that activity is subject (see, to that effect, *Commission v Germany*, paragraph 29, and Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 52).
- 21 Article 13 of Regulation No 1408/71, which is the first article of Title II on determination of the legislation applicable, provides in paragraph 1 thereof that, subject to Articles 14c and 14f, persons to whom the regulation applies are to be subject to the legislation of a single Member State only. As is apparent inter alia from the 5th, 8th and 10th recitals in the preamble to that regulation, the principle that the legislation of a single Member State is to apply in matters of social security is aimed at eliminating unequal treatment which, for employed and self-employed workers moving within the Community, is the consequence of partial or total overlapping of the applicable legislation (see, to that effect, Case C-169/98 *Commission v France* [2000] ECR I-1049, paragraph 43). Thus, according to Article 14a(2) of Regulation No 1408/71, a person normally self-employed in the territory of two or more Member States is to be subject to the legislation of the Member State in whose territory he resides (see Case C-340/94 *De Jaeck* [1997] ECR I-461, paragraph 11).
- 22 According to Article 14c(b) of Regulation No 1408/71, in the cases mentioned in Annex VII thereto, a person who is employed in one Member State and self-employed in another Member State is subject simultaneously to the legislation of each of those States. He is therefore required to pay such contributions as may be required of him by the legislation of each State (*De Jaeck*, paragraph 39).

- 23 Thus, in a situation such as that in the case in the main proceedings, where it is common ground that Mr Piatkowski is gainfully employed in the Netherlands and self-employed in Belgium and therefore falls within the case referred to in point 1 of Annex VII to Regulation No 1408/71, it is evident from the actual provisions of that regulation that the applicant may be required to pay the contributions prescribed under the Netherlands national insurance legislation, even though he pays contributions under Belgian national insurance legislation.
- 24 The Court must therefore examine whether Article 14c(b) of Regulation No 1408/71 precludes a worker from being subject, in respect of the same income, to social charges resulting from the simultaneous application of the two sets of national legislation at issue.
- 25 It should be pointed out in this connection, as does the national court, that, unlike its predecessor, the version of Article 14c(b) of Regulation No 1408/71 applicable to the facts of the case in the main proceedings no longer states that the legislation of each of the Member States concerned is to apply simultaneously only ‘as regards the activity pursued in its territory’.
- 26 In interpreting a provision of Community law, however, it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part (*De Jaeck*, paragraph 17, and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41).
- 27 To interpret Article 14c(b) of Regulation No 1408/71 as permitting double contributions to be levied in respect of the same income would penalise workers who exercise their right to free movement and thus would clearly run counter to the objective of that regulation. As the Court has held in relation to Article 14d(2) of Regulation No 1408/71, that provision requires Member States to treat workers

subject to the provisions of Article 14c(b) thereof without discrimination as compared with workers pursuing all their activities in a single Member State (see, to that effect, *Hervein and Others*, paragraph 61).

- 28 The logical implication of those provisions is thus that, in the cases referred to in Annex VII to Regulation No 1408/71, the insured person is to be subject to the legislation of the Member State in which he is employed as regards that gainful employment and to the legislation of the Member State in which he is self-employed as regards that self-employed activity.
- 29 Therefore, as regards income from gainful employment and income from self-employed activity, which may not, in any circumstances, be subject to double contributions, each of the Member States concerned can levy contributions only on the part of the income obtained in its territory (see, to that effect, *De Jaeck*, paragraph 40).
- 30 It is common ground that the interest payment at issue is not subject to the levy of contributions in Belgium. As a result, even if the rule prohibiting the levy of double contributions, referred to in the preceding paragraph of this judgment, applies not only to income from gainful employment and income from self-employed activity, but extends to all the income of persons falling within Article 14c(b) of Regulation No 1408/71, the Netherlands legislation at issue does not in any event undermine that rule.
- 31 In those circumstances, the fact that that regulation does not lay down any criterion connecting the income earned through interest payments to the Netherlands cannot in itself prevent that Member State from levying social security contributions in respect of that income under its national law.

- 32 Since Community law does not detract from the power of the Member States to organise their own social security systems (Case C-385/99 *Müller-Fauré and Van Riet* [2003] ECR I-4509, paragraph 100), in the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the conditions governing the right or duty to be insured with a social security scheme, the level of contributions payable by insured persons (see, in particular, Case C-512/03 *Blanckaert* [2005] ECR I-7685, paragraph 49) and the income to be taken into account when calculating social security contributions (Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 51).
- 33 All that is necessary, when the Member State concerned exercises that power, is that it comply with Community law (see, in particular, *Terhoeve*, paragraph 34, and Case C-227/03 *Van Pommeren-Bourgon diën* [2005] ECR I-6101, paragraph 39).
- 34 The Court has held, in this respect, that the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance. It follows that, even where its application is less favourable, such legislation is still compatible with Articles 48 and 52 of the Treaty if it does not place the worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return (see, to that effect, *Hervein and Others*, paragraph 51).
- 35 In this case, it must be noted, first of all, that Article 49(1)(c)(4) of the WIB, according to which income arising out of debts due from a company established in

the Netherlands constitutes income subject to the payment of social security contributions, applies without distinction to every recipient of such income, without putting workers who, like Mr Piatkowski, make use of their right of free movement at a disadvantage as compared with workers who pursue all their activities in that one Member State.

36 It is common ground that since the social security contributions paid by the applicant in the Netherlands confer on him a right to social protection in that Member State complementary to that which he enjoys in Belgium, the payment of such contributions is not without return.

37 It is true that, if account is taken of the interest payment in the contribution income which serves as the basis for calculating the social security contributions payable by Mr Piatkowski, that will not in itself confer on him a right to social benefits in the Netherlands additional to those he already enjoys in that Member State. Such a situation follows, however, firstly, as stated in paragraph 32 of this judgment, from the power retained by each Member State to determine the amount of contributions payable by insured persons and the income to be taken into account when calculating those contributions. The scope of the social protection and the precise method of calculating social security contributions are not relevant, since the obligation to pay those contributions is offset by the overall social protection provided.

- 38 Secondly, while the scope of the social protection in the case in the main proceedings is independent of the amount of the social security contributions paid, that situation is inherent in a system of social security based on principles of solidarity.
- 39 In those circumstances, it is not evident that the Netherlands legislation at issue undermines the principle of freedom of movement for persons guaranteed by Articles 48 and 52 of the Treaty.
- 40 The answer to the question referred by the national court must therefore be that Articles 48 and 52 of the Treaty concerning, respectively, freedom of movement for workers and freedom of establishment, and Article 14c(b) of Regulation No 1408/71 must be interpreted as not precluding Netherlands legislation which includes, in the basis for calculating social security contributions, interest such as that paid, in the case in the main proceedings, by a company established in the Netherlands to a Netherlands national resident in Belgium who is subject, under that regulation and taking into account the nature of his occupational activities, to the social security legislation of both those Member States.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 and 43 EC) concerning, respectively, freedom of movement for workers and freedom of establishment, and Article 14c(b) 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 and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, must be interpreted as not precluding Netherlands legislation which includes, in the basis for calculating social security contributions, interest such as that paid, in the case in the main proceedings, by a company established in the Netherlands to a Netherlands national resident in Belgium who is subject, under that regulation and taking into account the nature of his occupational activities, to the social security legislation of both those Member States.

[Signatures]