In Joined Cases 62 and 63/81

REFERENCES to the Court under Article 177 of the EEC Treaty by the Cour de Cassation [Court of Cassation] of the Grand Duchy of Luxembourg for a preliminary ruling in the disputes pending before that court between

SECO SA, a limited company incorporated under French law,

and

ÉTABLISSEMENT D'ASSURANCE CONTRE LA VIEILLESSE ET L'INVALIDITÉ (Old-age and Invalidity Insurance Institution),

and between

DESQUENNE & GIRAL SA, a limited company incorporated under French law,

and

ÉTABLISSEMENT D'ASSURANCE CONTRE LA VIEILLESSE ET L'INVALIDITÉ

on the interpretation of the provisions of the EEC Treaty on the freedom to provide services, in particular Article 60 thereof,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. 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 the contributions must be paid by the employer and half by the worker.

However, Article 174 of the Code des Assurances Sociales provides:

"An administrative regulation shall determine the conditions upon which temporary employment shall be exempt from insurance.

The Government may exempt from insurance foreigners who are only temporarily resident in the Grand Duchy.

In the latter case, however, the employer shall be liable for the share of contributions for which he is personally responsible."

It appears from the papers placed before the Court that the reason for the insertion of Article 174 was, on the one hand, that it would be inequitable to collect contributions from workers who leave Luxembourg after only a limited period of residence there; on the other hand, however, the temptation for employers to use foreign labour in order to alleviate the burden of paying their share of social insurance contributions must be avoided. Nevertheless, in practice the employer's share of contributions, provided for in the third paragraph of Article 174, is not required in respect of workers who are temporarily resident in Luxembourg if they are nationals of a Member State or persons treated as such, or in respect of workers who are nationals of a country linked to Luxembourg by an international convention on social security.

2. The disputes in the main proceedings are between the Établissement d'Assurance contre la Vieillesse et l'Invalidité Luxembourgeois [Luxembourg Old-age and Invalidity Insurance Institution, hereinafter referred to as "the Luxembourg institution"] and two undertakings based in France, which specialize in construction work and the maintenance of the infrastructure of railway networks, Seco SA and Desquenne & Giral SA.

In 1974 and 1977 those undertakings carried out work of various kinds in the Grand Duchy of Luxembourg. For that purpose they temporarily seconded workers who were neither nationals of a Member State nor from a country linked to Luxembourg by an international convention on social security during the period in question. It is not disputed that

during the entire duration of the work carried out in Luxembourg those workers remained compulsorily affiliated to French social security.

The two undertakings obtained an exemption for the employees' share of insurance contributions pursuant to the second paragraph of Article 174 of the Code des Assurances Sociales but were held liable by the Luxembourg institution for the employer's share of those contributions pursuant to the third paragraph of that article.

The two undertakings then brought proceedings against the decision of the Luxembourg institution holding them liable for the employer's share of contributions. They took the view that the Luxembourg legislation for this purpose was not applicable to them because it was incompatible with the Treaty as being a discriminatory practice likely to impede the freedom to provide services within the Community.

The Cour de Cassation [Court of Cassation] of the Grand Duchy of Luxembourg stayed the proceedings and referred the following questions to the Court of Justice under Article 177 of the EEC Treaty. The questions are the same in both cases.

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 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 freedom to provide 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?

3. The orders making the reference were registered at the Court on 19 March 1981.

By order of 13 May 1981 the Court decided to join both cases for the purposes of the procedure and judgment.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Seco SA and Desquenne & Giral SA, represented by Fernand Entringer of the Luxembourg Bar, by the Établissement d'Assurance contre la Vieillesse et l'Invalidité, represented by Jacques Loesch of the Luxembourg Bar, and by the Commission of the European Communities, represented by its Legal Adviser, Jean Amphoux, acting as Agent and assisted by Christine Berardis-Kayser, a member of the Commission's Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations

1. (a) *Seco and Desquenne & Giral SA* contend with regard to the *first question* that it is apparent from the background to the Luxembourg rules, by which an employer is required to pay the employer's share in respect of foreign workers who are only temporarily resident in the Grand Duchy, that the legislature's aim was to prevent employers from having anything to gain by employing foreigners in order to escape the social burdens imposed by the law.

They claim that those rules are an obstacle to the freedom to provide services in so far as, unlike undertakings established in the Grand Duchy, those established in another Member State are required to pay social security contributions twice — once in Luxembourg and once in the country in which they are established. That has an effect on the cost of their operations in Luxembourg and thus on their competitive position and thereby distorts the free play of competition. Moreover, the employers' contributions paid by the undertakings are a source of permanent unjust enrichment for the Luxembourg institution because it provides no benefit in return and there is no increased social security for the employees concerned.

Article 59 and subsequent articles of the EEC Treaty, which have been directly applicable since the end of the transitional period, impose a clear obligation on Member States to abolish all restrictions on the freedom to provide services. That implies in particular that an undertaking established on the territory of one Member State may not be directly or indirectly discriminated against in another Member State if it temporarily provides services in that Member State.

In the present case foreign undertakings providing services on a temporary basis are discriminated against, at least indirectly, owing to the cumulative application of two bodies of social security legislation, namely that of the country of origin and that of the host country.

The answer to the first question should therefore be that legislation such as that in issue is incompatible with the provisions and principles of Community law.

(b) The two undertakings contend that the *second question* is irrelevant and does not affect the answer to the first question in any respect. It is necessary and sufficient to examine whether the legislation in issue infringes or is capable of infringing the Treaty. However, there is no need to enter into considerations of an economic nature by setting off items showing a temporary loss against other items showing a temporary gain in respect of any particular operation.

2. (a) The *Établissement d'Assurance contre la Vieillesse et l'Invalidité* ("the Luxembourg institution") contends with regard to the *first question* that the legislation in issue does not constitute a discriminatory practice or an impediment to the freedom to provide services within the Community and is not therefore contrary to Article 60 of the Treaty or any other provision of Community law.

First, the workers in question, who are not nationals of a Member State or persons treated as such, are outside the ambit of Community law. They cannot claim the benefit of the provisions on the free movement of persons and services.

Secondly, the discrimination is not "general" in the sense that it arises from the very nature of the activity of the undertakings in question but "particular", occurring as the result of the special circumstance that, in order to carry out work, the undertakings in question have employed workers who, as it happens, are not nationals of a Member State or persons treated as such. Community law does not purport to abolish differences in treatment with regard to the provision of services where the essential cause of those differences is the subjective behaviour of a particular supplier of services and it is within his power to obviate them.

Furthermore, the Luxembourg authorities are entitled to refuse completely both entry into their territory and the paid employment of persons who are not nationals of a Member State or persons treated as such without violating Community law. The need for a work permit together with payment of compulsory social security contributions in the State in which the services are provided, in addition to the social security contributions paid in the State of origin, is a constraint which falls short of being a prohibition. The principle of the free movement of services may not therefore be construed so broadly as to permit, without any restriction, a supplier of services of one Member State to provide services in another Member State using persons who are entirely outside the ambit of Community law.

In conclusion the Luxembourg institution proposes that the Court should answer the first question as follows:

"Article 60 of the Treaty of Rome must be interpreted as meaning 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 State of the Communities temporarily undertaking work in the first-named State and employing workers in that State who are nationals of States which have no 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".

(b) As regards the *second question*, which was put in the event of the Court's deciding that in principle the practice in question constitutes a prohibited discriminatory practice, the Luxembourg institution is of the opinion that there is no discrimination if the supplier of services offsets the disadvantage of having to pay the employer's share twice by other economic factors.

The question whether or not there is any discrimination should be considered not in relation to any one single factor but from all aspects. It is necessary to determine whether an undertaking from one Member State providing a service in another Member State is, having regard to all the circumstances, placed in a less favourable situation than undertakings in the country in which the service is provided.

It is well known that Luxembourg is a country with high wages. If, therefore, an undertaking from a Member State is planning to provide services in Luxembourg, it often speculates at the outset on the positive advantage which it has over local competitors owing to the fact that the wages which it pays to its workers under the laws of the country of origin are lower than those paid in the country in which the services are provided.

Amongst other things Luxembourg legislation provides for a minimum wage which is a matter of public policy and applies to everyone in paid employment in Luxembourg. However, it will often be difficult in practice to enforce those rules with regard to a supplier of services who temporarily introduces foreign labour into Luxembourg. That will lead to an imbalance and a distortion of competition to the detriment of suppliers of the same services established in the country in which the services are provided. It is precisely the aim of the legislation in issue to prevent such a distortion and to redress the balance.

The answer to the second question might therefore be as follows:

"The practice described in the first question does not constitute a prohibited discriminatory practice if it is demonstrated that 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".

3. The *Commission* observes, first, that the Community regulations on social security for migrant workers, which provide for such workers to remain subject to the legislation of their country of origin and for that legislation alone to have application, apply only to workers who are nationals of a Member State. On the other hand there are not yet any similar provisions in force for workers from non-member countries. Therefore these cases do not disclose anything contrary to Community law from the social security aspect.

(a) The *first question* seeks in substance to determine whether Article 60 of the Treaty must be interpreted as meaning that it allows the Luxembourg social security institution to claim from the French companies, at it does from Luxembourg undertakings, their share of contributions to old-age and invalidity insurance, although the companies have already paid such contributions in France.

Article 60 does not simply lay down the principle of identical treatment. Under that article the possibility of demanding the same treatment as a national is

offered only as a right which the supplier of services may take advantage of. As regards the ways in which the host country may refuse such treatment, however, reference must be made to Article 59.

Since the end of the transitional period that provision, as interpreted by the Court, entails an outright prohibition of all discrimination against a supplier of services based on his nationality or on the fact that he is established in a Member State other than that in which the service is provided. It provides for the abolition of all requirements imposed on the supplier of services which are likely to prohibit or otherwise hinder his activities. Only exceptionally and in the case of certain services of a special nature may a Member State impose on the supplier certain specific requirements based on the public interest and applying to all persons established in that State, provided that the reason for those requirements is the application of professional or trade rules justified by the public interest and applying to all persons established in that State.

Furthermore, those specific requirements are permissible only if they are necessary to prevent the supplier of services from escaping those rules because he is established in another Member State, that is to say if the supplier of services is not subject to similar rules in the Member State in which he is established. Since the freedom to provide services is the rule, the principle that non-nationals should be treated as nationals of the host country must be interpreted strictly where it represents a hindrance to the provision of services and it may be invoked only in order to prevent provisions designed to protect the public interest from being circumvented.

The payment of insurance contributions to the Luxembourg institution is felt by the French companies to be a restriction on the supply of their services. Those undertakings already pay insurance contributions in France which cover the workers against old-age and the risk of invalidity even in the case of work carried out on secondment abroad. So the contributions claimed by the Luxembourg institution do not entail any additional protection for the workers concerned.

Therefore, even if the restriction imposed arises from a provision which applies irrespective of nationality, it is a form of discrimination which is prohibited under Article 59 of the Treaty.

The first question should therefore be answered as follows:

"Article 59 of the Treaty prohibits the Member State on whose territory the services are supplied from requiring the supplier of the services to pay insurance contributions if the supplier already pays similar contributions in the country in which he is established, provided that those contributions also cover the persons insured when the service is provided abroad and the payment of contributions in the host country does not result in increased social protection for those concerned".

(b) The *second question* asks whether, if it is established that the practice is contrary to Community law, the outcome is the same if the foreign under-

taking remains more competitive on the Luxembourg market because it pays its labour force lower wages than those which it has to pay in the Grand Duchy.

In the Commission's opinion every breach of Community law should be considered as it stands, without reference to any factor not connected with the discriminatory measure.

Therefore the fact that an undertaking which pays its workers wages complying with the applicable law, thereby benefiting from lower operating costs, has taken advantage of that legal situation is no justification for its having that advantage reduced by the imposition of unjustified insurance contributions. The same consideration would apply if the company had paid wages in breach of the applicable law since that offence on the part of the undertaking is no justification for the infringement committed by the national authorities with regard to insurance contributions.

The Commission therefore proposes that the second question should be answered as follows:

"A restriction prohibited under Community law must be abolished, even if the disadvantage which it entails is in practice offset by other economic factors".

III — Oral procedure

At the hearing on 21 October 1981 oral argument was presented by the following: Fernand Entringer, Avocat-Avoué, of the Luxembourg Bar, for Seco SA and Desquenne & Giral SA; Jacques Loesch, Avocat-Avoué, of the Luxembourg Bar, for the Établissement d'Assurance contre la Vieillesse et l'Invalidité; and Christine Berardis-Kayser and Jean Amphoux, acting as Agents, for the Commission.

The Advocate General delivered his opinion at the sitting on 16 December 1981.

Decision

1 By an order dated 26 February 1981 which was received at the Court on 19 March 1981 the Cour de Cassation [Court of Cassation] of the Grand Duchy of Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions as to the interpretation of the provisions of the Treaty concerning the freedom to provide services, having regard to the Luxembourg legislation governing contributions to old-age and invalidity insurance.

2 Those questions have been raised in the context of proceedings between the Établissement d'Assurance contre la Vieillesse et l'Invalidité [Old-age and Invalidity Insurance Institution, hereinafter referred to as "the Luxembourg

institution"], a Luxembourg social security institution, and two undertakings based in France specializing in construction work and the maintenance of the infrastructure of railway networks, Seco SA and Desquenne & Giral SA. In 1974 and 1977 those undertakings carried out work of various kinds in the Grand Duchy of Luxembourg. For that purpose they temporarily seconded workers who were neither nationals of a Member State nor from a country linked to Luxembourg, during the period in question, by an international convention on social security. Those workers remained compulsorily affiliated to the French social security scheme during the entire duration of the work carried out in Luxembourg.

3 By virtue of the provisions of the Luxembourg Code des Assurances Sociales [Social Insurance Code] workers employed in Luxembourg are in principle compulsorily insured under the old-age and invalidity insurance scheme. Half of the contributions must be paid by the employer and half by the worker. However, by virtue of the second paragraph of Article 174 of that Code the Luxembourg Government may exempt from insurance foreigners who are only temporarily resident in the Grand Duchy. In that case, by virtue of the third paragraph of Article 174 of the Code, the employer is nevertheless liable for the share of contributions for which he is personally responsible, although those contributions do not entitle the workers concerned to any social security benefit.

4 It appears from the papers placed before the Court that the reason for the enactment of the provisions cited above was, on the one hand, that it would be unfair to collect contributions from workers residing in Luxembourg only temporarily, whilst, on the other hand, the temptation for employers to use foreign labour in order to alleviate the burden of paying their share of social security contributions must be avoided. Nevertheless, in practice the employer's share of contributions is no longer required to be paid by employers in respect of workers who are temporarily resident in Luxembourg if they are nationals of a Member State or persons treated as such.

5 In this case the undertakings Seco and Desquenne & Giral obtained an exemption from the employee's share of insurance contributions pursuant to the second paragraph of Article 174 of the Code des Assurances Sociales but were held liable by the Luxembourg institution for the employer's share of those contributions pursuant to the third paragraph of that article. The two

undertakings appealed against that decision, claiming that the Luxembourg legislation in question was not applicable to them because it was discriminatory and likely to impede the freedom to provide services within the Community.

6 The Cour de Cassation of the Grand Duchy of Luxembourg considered that its decision turned on the question whether the national legislation in question was compatible with the rules of Community law on the freedom to provide services and referred 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 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 freedom to provide 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 disadvantages 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?"

7 In substance those questions seek to establish whether Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named

Member State, using workers who are nationals of non-member countries, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and for the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. In particular, it is asked whether such a requirement might be justified in so far as it offsets the economic advantages which the employer may have gained by not complying with the legislation on minimum wages in the State in which the work is performed.

8 Under Article 59 and the third paragraph of Article 60 of the EEC Treaty a 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. As the Court has repeatedly emphasized, most recently in its judgment of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305, those provisions entail the abolition of all discrimination against a person providing a service on the grounds of his nationality or the fact that he is established in a Member State other than that in which the service must be provided. Thus they prohibit not only overt discrimination based on the nationality of the person providing a service but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result.

9 Such is the case with national legislation of the kind in question when the obligation to pay the employer's share of social security contributions imposed on persons providing services within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment. In such a case the legislation of the State in which the service is provided proves in economic terms to be more onerous for employers established in another Member State, who in fact have to bear a heavier burden than those established within the national territory.

10 Furthermore, legislation which requires employers to pay in respect of their workers social security contributions not related to any social security benefit for those workers, who are moreover exempt from insurance in the Member State in which the service is provided and remain compulsorily affiliated, for the duration of the work carried out, to the social security scheme of the Member State in which their employer is established, may not reasonably be considered justified on account of the general interest in providing workers with social security.

11 In this connection the Luxembourg institution submits that, since the Member States may completely refuse to allow workers who are nationals of non-member countries to enter their territory or to undertake paid employment there, they may *a fortiori* attach to any work permit which they choose to grant conditions or restrictions such as the compulsory payment of the employer's share of social security contributions.

12 That argument cannot be accepted. A Member State's power to control the employment of nationals from a non-member country may not be used in order to impose a discriminatory burden on an undertaking from another Member Sate enjoying the freedom under Articles 59 and 60 of the Treaty to provide services.

13 The Luxembourg institution further submits that the application of national legislation such as that at issue in this case to persons providing services established in another Member State is in any event justified inasmuch as it in fact offsets the economic advantages which such persons may have gained by not complying with the legislation of the State in which their services are provided, in particular legislation on minimum wages. In this regard it refers to the particular difficulties which the State in which the services are provided would experience in enforcing compliance with such rules by employers established beyond its national territory.

14 It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into

by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. However, it is not possible to describe as an appropriate means any rule or practice which imposes a general requirement to pay social security contributions, or other such charges affecting the freedom to provide services, on all persons providing services who are established in other Member States and employ workers who are nationals of non-member countries, irrespective of whether those persons have complied with the legislation on minimum wages in the Member State in which the services are provided, because such a general measure is by its nature unlikely to make employers comply with that legislation or to be of any benefit whatsoever to the workers in question.

15 The answer to the questions submitted by the Cour de Cassation of the Grand Duchy of Luxembourg must therefore be that Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, using workers who are nationals of non-member countries, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed.

Costs

16 The costs incurred by the Commission, which submitted observations to the Court, are not recoverable. As this case is, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour de Cassation of the Grand Duchy of Luxembourg by an order dated 26 February 1981, hereby rules:

Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, using workers who are nationals of non-member countries, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 3 February 1982.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President