JUDGMENT OF THE COURT
26 January 1999 *

In Case C-18/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te 's-Hertogenbosch, Netherlands, for a preliminary ruling in the proceedings pending before that court between

F. C. Terhoeve

and

Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland

on the interpretation of Articles 7 and 48 of the EEC Treaty and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT,

composed of: P. J. G. Kapteyn, President of the Fourth and Sixth Chambers, acting for the President, G. Hirsch and P. Jann, Presidents of Chambers, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida, C. Gulmann, J. L. Murray, L. Sevón, M. Wathelet, R. Schintgen and K. M. Ioannou, Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Terhoeve, by F. W. van Eig and S. Feenstra, tax consultants at Moret Ernst & Young,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and

— the Commission of the European Communities, by B. J. Drijber and I. Martínez del Peral Cagigal, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Terhoeve, represented by S. Feenstra, the Netherlands Government, represented by M. Fierstra, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by P. J. Kuijper, Legal Adviser, acting as Agent, at the hearing on 17 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 30 April 1998,

gives the following

Judgment

1 By order of 30 December 1994, received at the Court on 23 January 1995, the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 7 and 48 of the EEC Treaty and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 Those questions were raised in proceedings between Mr Terhoeve and the Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland (Tax Inspector for Foreign Individuals and Undertakings; hereinafter 'the Inspector') concerning a combined assessment, covering income tax and social security contributions, for 1990.

National law

3 Under Netherlands law — in particular, the Algemene Ouderdomswet (General Law on old-age insurance), the Algemene Weduwen- en Wezenwet (General Law on insurance for widows and orphans), the Algemene Arbeidsongeschiktheidswet (General Law on insurance against incapacity for work) and the Algemene Wet Bijzondere Ziektekosten (General Law on special medical expenses) — compulsory insurance schemes apply in principle to all persons residing in the Netherlands.

4 The levying of social security contributions is closely connected to the levying of tax on wages and other income. Until 1990 taxable income for income tax purposes was subject to two levies, one for the collection of social security contributions and the other for the collection of income tax properly so called. In order to prevent a disparity from arising between the contributions paid and the social security benefits which could be expected, social security legislation provided that contributions were not to be levied in so far as income exceeded a certain limit. It was also laid down that the maximum income for the purpose of calculating the contributions had to be reduced pro rata where the person concerned had been liable to pay contributions for only part of the year.

5 A special situation arises where a person resides in the Netherlands for part of a calendar year and abroad for another part and, during those two periods, has taxable income in the Netherlands.

6 Until 1990 the legislation did not settle whether one or two assessments in respect of income in the calendar year had to be issued to such a taxpayer. In practice, two assessments were issued for the purpose of levying income tax: one relating to the period during which the taxpayer was resident and the other relating to the period during which he was non-resident. Social security contributions, by contrast, were collected by a single levy.

7 In 1990 the 'Oort' legislation, designed to simplify the national system for levying income tax and social security contributions, entered into force in the Netherlands. Since then, those different payments have been levied by a single combined assessment, in the case of both resident and non-resident taxpayers.

8 Article 62 of the Wet op de Inkomstenbelasting (Income Tax Law; hereinafter 'the WIB') henceforth states that where, in a calendar year, a person is liable to tax both at home and abroad, the tax on the foreign income and the tax on the Netherlands income are to be levied separately. If the taxpayer is also liable to social security contributions, the rules relating to the levying and recovery of income tax apply *mutatis mutandis*.

9 The levying of social security contributions in the Netherlands is governed by the Wet Financiering Volksverzekering (Law on the financing of social security; hereinafter 'the WFV'). Under Article 8 of the WFV, the income taken into account for the purpose of calculating contributions is equal to taxable income or domestic taxable income within the meaning of the WIB. However, since the social security benefits to which taxpayers are entitled are not linked to the amount of contributions paid, Article 10(6) of the WFV states that those contributions are levied only on an amount corresponding to the initial income tax band and thus, in principle, do not exceed a specified level (hereinafter 'the ceiling').

10 Article 8 of the WVF provides no legal basis for levying contributions where a person subject to compulsory insurance has income which is not subject to domestic income tax. However, under Article 6 of the Uitvoeringsregeling Premieheffing Volksverzekeringen (Regulation on the implementation of the levying of social security contributions), an insured person carrying on activities in respect of which the revenue is not liable to income tax is deemed, for the purposes of Article 8 of the WFV, to be liable to income tax on that revenue as well. Net income arising from activities by virtue of which such persons are insured is, for the purposes of Article 8 of the WFV, counted as domestic taxable income.

11 Accordingly, where a person has been liable in the same year to tax as a resident and as a non-resident, he is sent two combined notices of assessment. However, where such a taxpayer remains subject to the compulsory social security scheme throughout the year, the maximum basis of assessment for the levying of social security contributions is used for each of those two notices of assessment. Depending on the circumstances of the case, the effect of that scheme may be that the contributions for which the taxpayer is liable exceed the ceiling corresponding to the initial band of the income tax scale. In certain cases that disadvantage may be offset, indeed more than offset, by other advantages relating to the fact that the income from each period is subject to income tax separately, which may result in lower tax rates being applied.

The main proceedings

12 From 1 January 1990 to 6 November 1990 Mr Terhoeve, a Netherlands national, lived and worked in the United Kingdom because his employer, established in the Netherlands, had posted him there. Under Netherlands law, he was regarded during that period as non-resident for income tax purposes. The income from his activities in the United Kingdom during those few months was therefore not subject to Netherlands income tax. On the other hand, he continued to be insured under the compulsory Netherlands social security scheme.

13 On 7 November 1990 Mr Terhoeve transferred his residence to the Netherlands where, until the end of that year, he was resident for income tax purposes. At the hearing before the national court he stated, without being challenged, that he had not earned the bulk of his income in a single Member State in 1990.

14 On 29 April 1992 the Inspector issued Mr Terhoeve with a combined assessment to income tax and to social security contributions in respect of the period during which he had been a resident taxpayer. That assessment was calculated on the basis of taxable income of NLG 15 658 and included NLG 1 441 by way of social security contributions, calculated on the basis of a sum of NLG 6 552. Mr Terhoeve withdrew the objection which he had initially entered against that assessment and it thus ceased to be challengeable.

15 On 30 June 1992 the Inspector issued Mr Terhoeve, in respect of the period during which he had been a non-resident taxpayer, with a further combined assessment to, first, income tax, calculated on the basis of domestic income of NLG 16 201 arising from employment in the Netherlands and from real property there, and secondly, to social security contributions, calculated on the basis of a sum of NLG 98 201 and amounting to NLG 9 309, which corresponded to the maximum amount referred to in Article 10(6) of the WFV.

16 The Inspector arrived at that amount in contributions because he took account of the income — not subject to Netherlands income tax — which Mr Terhoeve had earned in 1990 from his employment in the United Kingdom.

17 It follows from the above that the social security contributions claimed from Mr Terhoeve in the two notices of assessment amounted to NLG 10 750 (that is to say, NLG 1 441 for the period in which he had enjoyed resident status and NLG 9 309 for the period in which he had enjoyed non-resident status). By contrast, under the applicable provisions of Netherlands law a taxpayer with resident

status or non-resident status throughout the year would have paid social security contributions only up to the ceiling of NLG 9 309.

18 It is common ground that the payment of a contribution in excess of the ceiling does not lead to any entitlement to additional benefits, because the social security benefits to which taxpayers are entitled are not linked to the amounts paid by way of contributions. Thus, Mr Terhoeve had to pay an amount in excess of the ceiling for 1990 but did not acquire greater entitlement than persons who paid contributions corresponding to the ceiling.

19 Mr Terhoeve initially lodged an objection against the second notice of assessment with the Inspector, who rejected it.

20 He then brought an action before the Gerechtshof te 's-Hertogenbosch, claiming in particular that the Netherlands legislation, which makes provision for two separate assessments while the ceiling laid down for the levying of social security contributions is not reduced to reflect the period covered, is incompatible with Article 48 of the Treaty. Mr Terhoeve states, with regard to the calculation of the social security contributions for the period from 1 January to 6 November 1990 inclusive, that there is indirect discrimination on grounds of nationality in that the emigrants and immigrants subject to a heavier contributions burden are mainly nationals of the other Member States.

21 The Inspector contended before the national court, without providing more precise supporting data, that nearly half of the taxpayers who were actually or notionally non-resident were Netherlands nationals. Mr Terhoeve did not consider himself able to put forward grounds to contradict that contention.

22 It is apparent from the order for reference that, under the rules of evidence applicable in the Netherlands in tax cases, Mr Terhoeve's argument must therefore be rejected.

23 In the first place, the national court is unsure whether the main proceedings, on their facts, fall within the scope of Article 48 of the Treaty. Second, it is uncertain whether the rules of evidence in the Netherlands can be applied without restriction or whether certain rules and principles in this area are imposed by Community law. Third, it asks what the effect is of the Community provisions on freedom of movement for workers. Finally, it raises the question as to the consequences which would need to be drawn should the provisions of Netherlands law be incompatible with Community law.

24 The Gerechtshof te 's-Hertogenbosch, considering that it was necessary to ask the Court to interpret Community law, stayed proceedings and referred the following questions to it for a preliminary ruling:

'1. Are the provisions of Community law on freedom of movement for workers applicable to a national of a Member State who transfers his residence in the course of a year from another Member State to the Member State of which he is a national and who is successively employed in that year in each of those Member States, and who did not earn most of his income during that year in one of those two Member States?

2. (a) Does it follow from Community law, in particular Articles 7 and 48(2) of the EEC Treaty and Article 7(2) of Regulation No 1612/68, that in the application of legislation operating to the disadvantage of emigrants and

immigrants as regards liability to make social security contributions there is a presumption that such disadvantage mainly affects nationals of other States?

(b) If question (a) is answered in the affirmative, is that presumption rebuttable or not?

(c) If the presumption in question is rebuttable, is the possibility of doing so governed solely by national procedural law, in particular the rules of evidence of the Member State concerned, or does Community law also lay down requirements in that regard?

(d) If Community law makes the rebuttal of such a presumption subject to certain requirements, what significance attaches in the present case to the following circumstances:

— the respondent authority has stated that, of the very much broader category of taxpayers residing abroad, almost one-half are its own nationals, without adducing any evidence in support of that assertion;

— the appellant, who pleads indirect discrimination on grounds of nationality, has not contested the correctness of that assertion by the authority;

— the respondent authority is in an appreciably better position than the appellant to collect information capable of rebutting the aforementioned presumption?

3. Is there any rule of Community law precluding a Member State, regardless of any question of (indirect) discrimination on grounds of nationality, from imposing, in a given year, a heavier social security contributions burden on an employee who transfers his residence during that year from that Member State to another Member State, or vice versa, than on an employee who, in otherwise identical circumstances, continues to reside throughout the whole year in a single Member State?

4. If the imposition of a heavier contributions burden, as referred to in the previous question, is in principle incompatible with Article 7 or Article 48(2) of the EEC Treaty, or with any other rule of Community law, can it be justified by one or more of the following circumstances, whether or not they are linked with each other:

— the measure results from legislation whereby the levying of income tax and social security contributions is intended, in order to simplify matters, to coincide to a very great extent, if not entirely;

— solutions which, whilst maintaining that link, preclude the imposition of the heavier contributions referred to above, result in technical problems of implementation or in possible over-compensation;

— in certain cases, albeit not in the present case, overall liability to income tax and social security contributions is lower for immigrants and emigrants in the year in which they move than for persons who, in otherwise identical circumstances, retain the same residence throughout the whole year?

5. (a) If a heavier contributions burden, as referred to in Question 3, is incompatible with Article 7 or Article 48(2) of the EEC Treaty, or with any other rule of Community law, should there be taken into account, in determining whether in any specific case a heavier burden is actually involved, only income from employment or, in addition, other income received by the person concerned, such as profits from real property?

(b) If other income apart from earnings from employment is to be left out of consideration, how is it to be determined whether, and to what extent, the levying of contributions on income from employment places the migrant worker concerned at a disadvantage?

6. (a) If in the present case there was an infringement of any rule of Community law, is the national court obliged to bring that infringement to an end even if to do so would require a choice between different alternatives each of which entails advantages and disadvantages?

(b) If the national court in this case does bring an infringement of EC law to an end, does Community law provide any directions as to the choice which the national court should make between different conceivable solutions?'

Question 1

25 By its first question, the national court essentially seeks to ascertain whether Article 48 of the Treaty and Article 7 of Regulation No 1612/68 may be relied on by a worker against the Member State of which he is a national where he has resided and been employed in another Member State.

26 It is settled case-law that the Treaty rules governing freedom of movement for persons and measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all respects within a single Member State (Case C-332/90 *Steen* v *Deutsche Bundespost* [1992] ECR I-341, paragraph 9; Case C-134/95 *USSL No 47 di Biella* v *INAIL* [1997] ECR I-195, paragraph 19; Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen* v *Uecker* and *Jacquet* v *Land Nordrhein-Westfalen* [1997] ECR I-3171, paragraph 16; and Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasakalis and Others* v *Greek State* [1998] ECR I-4239, paragraph 22).

27 However, as the Court has stated, in particular in Case C-419/92 *Scholz* v *Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505, at paragraph 9, any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State falls within the scope of the aforesaid provisions.

28 It follows that, in the main proceedings, even though Mr Terhoeve, a Netherlands national, seeks to rely on the rules relating to freedom of movement for workers against the Netherlands authorities, that does not affect the application of those rules. His complaint is precisely that he was placed at a disadvantage because he worked in another Member State.

29 The answer to the first question must therefore be that Article 48 of the Treaty and Article 7 of Regulation No 1612/68 may be relied on by a worker against the Member State of which he is a national where he has resided and been employed in another Member State.

Questions 2 and 3

30 By its second and third questions, which it is appropriate to deal with together, the national court essentially asks whether Articles 7 and 48 of the Treaty or Article 7(2) of Regulation No 1612/68 preclude a Member State from levying, on a worker who has transferred his residence in the course of a year from one Member State to another in order to take up employment there, greater social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in the Member State in question, where the first worker is not also entitled to additional social benefits. Should the answer to that question depend on whether workers who are nationals of other Member States are discriminated against, the national court further seeks to ascertain whether, in circumstances of that kind, such discrimination must be presumed and, if so, whether and under what conditions that presumption may be rebutted.

31 It should be noted at the outset, first, that under Article 14(1)(a) 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), a person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to work there for that undertaking is to continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.

32 It follows that, as regards the social security scheme, a person in Mr Terhoeve's position continues in principle to be covered by Netherlands legislation for the period during which he works in the United Kingdom.

33 Secondly, it is necessary to consider the argument put forward by the Netherlands Government at the hearing. After pointing out that Community law does not detract from the powers of the Member States to organise their social security schemes (Case 238/82 *Duphar and Others* v *Netherlands State* [1984] ECR 523; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *AGF and Cancava* [1993] ECR I-637; Case C-238/94 *García and Others* v *Mutuelle de Prévoyance Sociale d'Aquitaine and Others* [1996] ECR I-1673; and Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395), it stated that the national authorities may freely determine the detailed rules for financing those schemes.

34 However, while it is true that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions governing the right or duty to be insured with a social security scheme, the Member States must nevertheless comply with Community law when exercising that power (see, in particular, Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, paragraphs 18 and 19).

35 Thus, the fact that the national rules at issue in the main proceedings concern the financing of social security does not exclude the application of Treaty rules, in particular those relating to freedom of movement for workers.

36 As regards Article 48 of the Treaty, which it is appropriate to consider first, the Court has stated time and again that that provision implements a fundamental principle contained in Article 3(c) of the EC Treaty, under which, for the purposes set out in Article 2, the activities of the Community are to include the abolition, as between Member States, of obstacles to freedom of movement for persons (see, in particular, Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16, and Case C-370/90 *The Queen* v *Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, paragraph 15).

37 The Court has also held that the Treaty provisions relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877, paragraph 13; *Singh*, cited above, paragraph 16; and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman* [1995] ECR I-4921, paragraph 94).

38 In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity (see, *inter alia*, Case C-363/89 *Roux* v *Belgian State* [1991] ECR I-273, paragraph 9; *Singh*, cited above, paragraph 17; and *Bosman*, cited above, paragraph 95).

39 Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraphs 18 and 19, and *Bosman*, cited above, paragraph 96).

40 A national of a Member State could be deterred from leaving the Member State in which he resides in order to pursue an activity as an employed person, for the purposes of the Treaty, in the territory of another Member State if he were required to pay greater social contributions than if he continued to reside in the same Member State throughout the year, without thereby being entitled to additional social benefits such as to compensate for that increase.

41 It follows that national legislation of the kind at issue in the main proceedings constitutes an obstacle to freedom of movement for workers, prohibited in principle by Article 48 of the Treaty. It is therefore unnecessary to consider whether there is indirect discrimination on grounds of nationality, liable to be prohibited by Articles 7 and 48 of the Treaty or by Article 7(2) of Regulation No 1612/68, or to consider the set of presumptions which might apply in that regard.

42 The answer to the second and third questions must therefore be that Article 48 of the Treaty precludes a Member State from levying, on a worker who has transferred his residence in the course of a year from one Member State to another in order to take up employment there, greater social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in the Member State in question, where the first worker is not also entitled to additional social benefits.

Question 4

43 In the light of the answer given to the preceding questions, the national court must be considered, by its fourth question, to be seeking to ascertain whether a heavier contributions burden on a worker who transfers his residence from one Member State to another in order to take up employment there, which is in principle incompatible with Article 48 of the Treaty, may be justified, first, by the fact that it stems from legislation whose objective is to simplify and coordinate the levying of income tax and social security contributions, secondly, by difficulties of a technical nature linked to the adoption of other methods of collection or, thirdly, by the fact that,

in certain circumstances, other advantages relating to income tax may offset, or indeed outweigh, the disadvantage as to social contributions.

44 As regards the first justification referred to, it should be noted that the Member States in principle retain the freedom to lay down the detailed rules for levying tax and social security contributions and may indeed pursue the objective of simplifying and coordinating those rules. Nevertheless, that objective, however desirable its pursuit may be, cannot justify undermining the rights which individuals derive from the Treaty provisions in which their fundamental freedoms are enshrined.

45 The same holds true for the second justification referred to. Considerations of an administrative nature cannot justify derogation by a Member State from the rules of Community law. That principle applies with even greater force where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law (see, to that effect, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 54).

46 So far as concerns the third justification mentioned by the national court, suffice it to state that, in the light of the documents before the Court, a person in Mr Terhoeve's position does not enjoy any advantage relating to the calculation of income tax. The fact that other workers who have transferred their residence in the course of the year and whose circumstances are different may derive an advantage with regard to the calculation of income tax can neither eliminate nor compensate for

the obstacle to freedom of movement described above (see, to that effect, Case 20/85 *Roviello* v *Landesversicherungsanstalt Schwaben* [1988] ECR 2805).

47 The answer to the fourth question must therefore be that a heavier contributions burden on a worker who transfers his residence from one Member State to another in order to take up employment there, which is in principle incompatible with Article 48 of the Treaty, may not be justified either by the fact that it stems from legislation whose objective is to simplify and coordinate the levying of income tax and social security contributions, or by difficulties of a technical nature preventing other methods of collection, or else by the fact that, in certain circumstances, other advantages relating to income tax may offset, or indeed outweigh, the disadvantage as to social contributions.

Question 5

48 By its fifth question, the national court essentially asks whether, when assessing whether the burden of social security contributions borne by a worker who has transferred his residence from one Member State to another in order to take up employment there is heavier than that borne by a worker who has continued to reside in the same Member State, account must be taken only of income arising from employment or also of other income, such as income arising from real property.

49 It should be noted, first, that Article 48 of the Treaty applies only to employees and to persons who move in order to seek employment. Thus, persons who derive

income from other sources, including real property, do not fall as such within that provision.

50 Nevertheless, a person covered by Article 48 may rely on that provision to challenge national legislation entailing an obstacle to his freedom of movement, whatever mechanism gives rise to that obstacle.

51 Secondly, in the absence of Community harmonisation of national laws, it is in principle for the Member States to specify the income to be taken into account when calculating social security contributions.

52 However, if national legislation sets the level of social security contributions by taking into account not only income from employment but also other income, that legislation cannot thereby result in workers who move in the course of a year in order to work in another Member State being penalised compared with those who continue to reside in the same Member State. That being so, the nature of the income taken into account to determine social security contributions is irrelevant in the main proceedings.

53 The answer to the fifth question must therefore be that, when assessing whether the burden of social security contributions borne by a worker who has transferred his residence from one Member State to another in order to take up employment there is heavier than that borne by a worker who has continued to reside in the same Member State, all income relevant under national law for determining the

amount of contributions, including, as the case may be, income arising from real property, must be taken into account.

Question 6

54 In the light of the answers given to the preceding questions, the sixth question is concerned with the consequences which would attach to a finding by the national court that the contested national legislation is incompatible with Article 48 of the Treaty.

55 As the Court first held in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, Article 48 of the Treaty has direct effect in the legal orders of the Member States and confers on individuals rights which the national courts must protect.

56 It is also settled case-law that every national court must apply Community law in its entirety and protect rights which the latter confers on individuals, where necessary disapplying any provision of national law which may conflict with it.

57 Furthermore, where national law lays down that a number of groups of persons are to be treated differently, in breach of Community law, the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned, arrangements which, for want of the correct application of Community law, remain the only valid point of reference (see, *mutatis mutandis*, Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855; Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney-General* [1987] ECR 1453; Case C-102/88 *Ruzius-Wilbrink* v *Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311; Case

C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591; and Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297).

58 It follows that the social security contributions payable by a worker who transfers his residence from one Member State to another in order to take up employment there must be set at the same level as that for the contributions which would be payable by a worker who has continued to reside in the same Member State.

59 The answer to the sixth question must therefore be that, if the contested national legislation is incompatible with Article 48 of the Treaty, a worker who transfers his residence from one Member State to another in order to take up employment there is entitled to have his social security contributions set at the same level as that of the contributions which would be payable by a worker who has continued to reside in the same Member State.

Costs

60 The costs incurred by the Netherlands Government and the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Gerechtshof te 's-Hertogenbosch by order of 30 December 1994, hereby rules:

1. **Article 48 of the EEC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community may be relied on by a worker against the Member State of which he is a national where he has resided and been employed in another Member State.**

2. **Article 48 of the Treaty precludes a Member State from levying, on a worker who has transferred his residence in the course of a year from one Member State to another in order to take up employment there, greater social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in the Member State in question, where the first worker is not also entitled to additional social benefits.**

3. **A heavier contributions burden on a worker who transfers his residence from one Member State to another in order to take up employment there, which is in principle incompatible with Article 48 of the Treaty, may not be justified either by the fact that it stems from legislation whose objective is to simplify and coordinate the levying of income tax and social security contributions, or by difficulties of a technical nature preventing other methods of**

collection, or else by the fact that, in certain circumstances, other advantages relating to income tax may offset, or indeed outweigh, the disadvantage as to social contributions.

4. **When assessing whether the burden of social security contributions borne by a worker who has transferred his residence from one Member State to another in order to take up employment there is heavier than that borne by a worker who has continued to reside in the same Member State, all income relevant under national law for determining the amount of contributions, including, as the case may be, income arising from real property, must be taken into account.**

5. **If the contested national legislation is incompatible with Article 48 of the Treaty, a worker who transfers his residence from one Member State to another in order to take up employment there is entitled to have his social security contributions set at the same level as that of the contributions which would be payable by a worker who has continued to reside in the same Member State.**

Kapteyn Hirsch Jann

Mancini Moitinho de Almeida Gulmann Murray

Sevón Wathelet Schintgen Ioannou

Delivered in open court in Luxembourg on 26 January 1999.

R. Grass P. J. G. Kapteyn

Registrar For the President