JUDGMENT OF THE COURT (Third Chamber)

19 November 2009 (*)

(Income tax legislation – Right to deduct social security contributions from the basis of assessment for tax – Right to a tax reduction on the basis of health insurance contributions paid – Refusal where contributions are paid in a Member State other than the State of taxation – Whether compatible with Articles 43 EC and 49 EC – Judgment of the national constitutional court – Unconstitutionality of provisions of national law – Deferral of the date on which those provisions are to lose their binding force – Primacy of Community law – Implications for the national court)

In Case C-314/08,

REFERENCE for a preliminary ruling under Article 234 EC by the Wojewódzki Sąd Administracyjny w Poznaniu (Poland), made by decision of 30 May 2008, received at the Court on 14 July 2008, in the proceedings

Krzysztof Filipiak

v

Dyrektor Izby Skarbowej w Poznaniu,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting for the President of the Third Chamber, A. Rosas (Rapporteur) and A. Ó Caoimh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Polish Government, by M. Dowgielewicz, acting as Agent,

– the Commission of the European Communities, by R. Lyal and K. Herrmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 43 EC and 49 EC.

2 The reference has been made in the context of proceedings between Mr Filipiak, a Polish national who is subject to unlimited tax liability in Poland, and the Dyrektor Izby Skarbowej w Poznaniu (Director of the Poznań Tax Chamber) ('the Dyrektor') concerning the refusal of the Polish tax authorities to grant Mr Filipiak entitlement to tax advantages in respect of the payment of social security and health insurance contributions in the tax year, in the case where the contributions were paid in a Member State other than the State of taxation, even though such tax advantages are granted to taxpayers whose contributions are paid in the Member State of taxation.

National law

3 Article 2 of the Polish Constitution provides:

'The Republic of Poland is a democratic State subject to the rule of law and implementing the principles of social justice'.

4 Under Article 8 of the Polish Constitution:

'1. The Constitution is the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise'.

5 Article 32 of the Polish Constitution provides:

'1. All persons are equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.'

6 Article 91 of the Polish Constitution states:

'1. After publication thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be directly applicable, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over that statute if such an agreement cannot be reconciled with the provisions of that statute.

3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by that organisation shall be applied directly and have precedence in the event of a conflict of laws'.

7 Under Article 188 of the Polish Constitution:

'The Trybunał Konstytucyjny [Polish Constitutional Court] shall adjudicate on the following matters:

(1) the conformity of statutes and international agreements with the Constitution;

(2) the conformity of a statute with ratified international agreements whose ratification required

prior consent granted by statute;

(3) the conformity of legal provisions issued by central State authorities with the Constitution, ratified international agreements and statutes;

(4) the conformity with the Constitution of the purposes or activities of political parties;

(5) complaints concerning constitutional infringements, as specified in Article 79(1)'.

8 Paragraphs 1 to 4 of Article 190 of the Polish Constitution are worded as follows:

'1. Judgments of the Constitutional Court shall be of universally binding application and shall be final.

…

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in the case of a statute or 12 months in the case of any other normative act. …

4. A judgment of the Constitutional Court on the non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters has been issued, shall constitute a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and in accordance with principles specified in provisions applicable to the given proceedings.'

9 Article 3(1) of the Law of 26 July 1991 on income tax payable by natural persons (ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych, Dz. U of 2000, No 14, heading 176; 'the Law on income tax'), which sets out the general rule of unlimited tax liability, provides:

'Natural persons who are resident in the territory of the Republic of Poland shall be liable to tax on all of their income, wherever it arises …'.

10 Article 26(1)(2) of that Law provides:

'Without prejudice to Article 24(3), Articles 29 to 30c and Article 30e, the basis of assessment shall be income determined in accordance with Article 9, Article 24(1), (2), (4), (4a) to (4e) and (6), or with Article 24b(1) and (2), or with Article 25, after deduction of the amount:

…

(2) of the contributions specified in the Law of 13 October 1998 on the social security system [Dz. U n° 137, heading 887, as amended; "the Law on social security"]:

(a) paid directly, in the tax year, for retirement and other pension insurance, sickness and accident insurance of the taxpayer or persons working with him,

(b) deducted, in the tax year … from the taxpayer's funds …'.

11 Article 27b of the Law on income tax states:

‘1. Income tax assessed in accordance with Articles 27 or 30c shall be reduced by the amount of health insurance contributions referred to in the Law of 27 August 2004 on publicly funded health-care benefits (ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych, Dz. U n° 210, heading 2135; “the Law on publicly funded health-care benefits”):

(1) paid in the tax year directly by the taxpayer in accordance with the provisions on publicly funded health-care benefits,

(2) collected during the tax year by the person liable to pay the tax in accordance with those provisions,

...

2. The amount of the health insurance contributions deductible from tax shall not exceed 7.75% of the basis on which those contributions are assessed.

…’.

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

12 It is apparent from the order for reference that, at the material time of the dispute in the main proceedings, Mr Filipiak, a Polish citizen, was pursuing an economic activity in the Netherlands as a partner in a partnership under Netherlands law, the organisational structure of which corresponded to that of a general partnership under Polish law.

13 It is also apparent from the order for reference that Mr Filipiak is subject to unlimited tax liability in Poland, which suggests that his place of residence is in Poland, pursuant to Article 3 of the Law on income tax.

14 Mr Filipiak paid in the Netherlands the social security and health insurance contributions required of him by Netherlands legislation.

15 By letter of 28 June 2006, Mr Filipiak requested from the director of the tax office of Nowy Tomyśl advice in writing on the scope and manner of application of tax law.

16 In his request for that advice, Mr Filipiak observes that the provisions of the Law on income tax do not allow him to deduct the social security contributions paid in the Netherlands from his basis of assessment and to reduce the tax by the amount of the health insurance contributions also paid in the Netherlands. He claims that such provisions are discriminatory and, that being the case, that those provisions should be disregarded and Community law should be applied directly.

17 By decisions of 2 August 2007, the director of the Nowy Tomyśl tax office replied to the request for advice and expressed the view that Mr Filipiak’s position was unfounded.

18 The director stated that, pursuant to Article 26(1)(2) of the Law on income tax, the only contributions which could be deducted from the basis of assessment were those specified in the Law on social security and that, pursuant to Article 27b(1) of the Law on income tax, the only health insurance contributions which could be deducted from tax were those specified in the Law on publicly funded health-care benefits. As the contributions paid under Netherlands law did not satisfy the criteria laid

down in those provisions, they could not be deducted in Poland from the basis of assessment and from income tax respectively.

19 After consideration of the complaints raised before him by Mr Filipiak, the Dyrektor upheld the decisions of the director of the Nowy Tomyśl tax office of 2 August 2007.

20 Mr Filipiak brought an action against those decisions before the Wojewódzki Sąd Administracyjny w Poznaniu (Regional Administrative Court, Poznań) (Poland) on the grounds that they infringe, inter alia, Articles 26(1)(2) and 27b(1) of the Law on income tax, Article 39(2) EC, Article 3(1) of Regulation (EEC) No 1408/71 of the Council 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 Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) (‘Regulation No 1408/71’), and various provisions of the Polish Constitution.

21 The Wojewódzki Sąd Administracyjny w Poznaniu takes the view that the prerequisites for an infringement of the freedom of movement for workers provided for in Article 39 EC are not satisfied in the present case. That court states in this regard that, since the applicant in the main proceedings is a businessman who is a member of a general partnership based in the Netherlands, he is self-employed and does not work on the orders or under the control of another person. He cannot therefore be regarded as a ‘worker’ within the meaning of Article 39 EC.

22 The referring court considers that it is essential to examine whether the provisions at issue are compatible with a provision which was not relied on by Mr Filipiak, namely Article 43 EC, where the effect of those provisions is that a taxpayer who is subject to unlimited tax liability in Poland on the entirety of his income and who pursues an economic activity in another Member State is not allowed to deduct from his basis of assessment the amount of the compulsory social security contributions paid in the Netherlands and is not allowed to reduce his income tax by the amount of the compulsory health insurance contributions also paid in the Netherlands, even though those contributions were not deducted in that Member State.

23 The referring court states that the Trybunał Konstytucyjny has already ruled on the compatibility of Articles 26(1)(2) and 27b of the Law on income tax with the Polish Constitution.

24 By judgment of 7 November 2007 (K 18/06, Dz. U of 2007, No 211, heading 1549), the Trybunał Konstytucyjny held that, to the extent to which the tax provisions at issue do not allow taxpayers specified in Article 27(9) of the Law on income tax to deduct social security and health insurance contributions from income deriving from an activity pursued outside the Republic of Poland and from the tax payable thereon where those contributions were not deducted in the Member State in which that activity was pursued, those provisions are not compatible with the principle of equality before the law laid down in Article 32 of the Polish Constitution, in conjunction with the principle of social justice, set out in Article 2 of that Constitution.

25 In the same judgment, pursuant to Article 190(3) of the Polish Constitution, the Trybunał Konstytucyjny decided to defer the date on which the provisions held to be unconstitutional would lose all binding force to a date other than that of publication of the judgment, namely to 30 November 2008.

26 In those circumstances, the Wojewódzki Sąd Administracyjny w Poznaniu decided to stay the

proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Must the first and second paragraphs of Article 43 EC be construed as precluding the provisions of Article 26(1)(2) of [the Law on income tax], under which the right to a reduction of the basis of assessment for income tax by the amount of compulsory social security contributions is restricted to contributions paid on the basis of provisions of national law, and the provisions of Article 27b(1) of that Law, under which the right to a reduction of income tax by the amount of compulsory health insurance contributions is restricted to contributions paid on the basis of provisions of national law, in the case where a Polish national, who is subject to unlimited liability to tax in Poland on income taxed there, has paid in another Member State compulsory social security and health insurance contributions in respect of an economic activity pursued in that other State, and those contributions have not been deducted either from income or from tax in that other Member State?

2. Must the principle of the primacy of Community law following from Article 10 EC and the first and second paragraphs of Article 43 EC be construed as taking precedence over the provisions of national law referred to in Article 91(2) and (3) and Article 190(1) and (3) of the Polish Constitution … in so far as the entry into force of a judgment of the Polish Constitutional Court has been deferred on the basis of those provisions?’

Admissibility

Observations submitted to the Court

27 The Polish Government expresses doubts as to whether it is open to the Court to give a ruling on the questions referred by the national court.

28 The Polish Government thus claims that the requested interpretation of Community law and the questions referred for a preliminary ruling by the referring court are not sufficiently linked to the subject-matter of the dispute in the main proceedings. The condition that the Court’s decision must be essential to enable the referring court to give judgment in the case before it is, it argues, not satisfied. A consideration of the elements of fact and law set out by the referring court leads to the conclusion that the dispute can, and indeed should, be examined solely on the basis of the provisions of national law.

29 The Polish Government observes in that regard that, by its first question, the referring court seeks to determine whether, when ruling in the dispute in the main proceedings, it ought to take account of the provisions at issue of the Law on income tax in so far as they adversely affect the right of the taxpayer to deduct in Poland social security and health insurance contributions which have been paid abroad.

30 However, in its judgment of 7 November 2007 the Trybunał Konstytucyjny has already answered that question by ruling that, in circumstances such as those in the main proceedings, a taxpayer must be able to deduct the amount of social security and health insurance contributions.

31 According to the Polish Government, the effect of the judgment of 7 November 2007 of the Trybunał Konstytucyjny holding the statutory provisions at issue to be incompatible with the Polish Constitution is that they may not be applied by the courts and tribunals, in other words they are wholly struck out of the legal system.

32 The fact that, in its judgment of 7 November 2007, the Trybunał Konstytucyjny deferred the date on

which the unconstitutional provisions were to lose their binding force does not imply that the provisions held to be unconstitutional must be applied up to the date specified by the Trybunał Konstytucyjny. The proposition that until that date the provisions at issue are compatible with the Constitution and that after that date they must be regarded as unconstitutional is, the Polish Government contends, not tenable.

33 The Polish Government takes the view, consequently, that the referring court must apply Articles 26(1)(2) and 27b(1) of the Law on income tax while taking account of the interpretation of those provisions in the light of the Polish Constitution. In the main proceedings in the present case, the referring court should, on the basis of the interpretation made by the Trybunał Konstytucyjny and the principles of equality before the law and social justice, refuse to apply the provisions at issue in so far as they preclude any deduction of social security and health insurance contributions in cases where the contributions have not been deducted in the Member State of the European Union in which the economic activity has been pursued and the contributions have been paid.

34 Consequently, the Polish Government submits, it is not necessary, to enable a ruling to be given on the dispute in the main proceedings, to answer the question whether Article 43 EC precludes provisions such as those at issue in the main proceedings.

35 As regards the second question referred for a preliminary ruling, it submits that the interpretation of Community law requested by the referring court is not necessary to enable it to give judgment in the dispute before it on the ground that that interpretation is obvious.

36 The Polish Government states that the referring court appears to proceed on the basis that the deferral of the loss of binding force of the provisions at issue in the main proceedings, in conjunction with the rule that decisions of the Trybunał Konstytucyjny are final, prevents the referring court from reviewing the compatibility of the provisions at issue with Community law and from refusing to apply those provisions where it finds that they are not compatible with Community law.

37 The Polish Government, however, considers that such a standpoint is inappropriate, regard being had to the fact that the different forms of judicial review, namely the review of the compatibility of the provisions at issue with the Polish Constitution and the review of the compatibility of those provisions with Community law, are autonomous.

38 The decision of the Trybunał Konstytucyjny deferring the loss of binding force of the provisions held to be unconstitutional does not prevent judicial review of the compatibility of those provisions with Community law and, where there is a conflict of laws, does not release the referring court from the obligation to refrain from applying those provisions in the event that they are considered to be incompatible with Community law. Article 91 of the Polish Constitution imposes on national courts the obligation not to apply a provision of national law which is contrary to Community law.

39 Consequently, according to the Polish Government, quite apart from the possibility of not applying the provisions at issue because they have been held to be unconstitutional, the referring court which concludes that those provisions are incompatible with Article 43 EC is fully, and autonomously, entitled to refuse to apply them in its resolution of the dispute, in accordance with national law and possibly with the case-law of the Court of Justice on the principle of the primacy of Community law.

Appraisal by the Court

40 According to settled case-law, in proceedings under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-544/07 *Rüffler* [2009] ECR I-0000, paragraph 36).

41 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; *PreussenElektra*, paragraph 39; and *Rüffler*, paragraph 37).

42 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*PreussenElektra*, paragraph 39, and *Rüffler*, paragraph 38).

43 In that regard, it is clear from the order for reference that, irrespective of the question of the constitutionality of the provisions at issue in the main proceedings, the dispute in the main proceedings and the first question in the reference relate to the compatibility with Community law of legislation under which the right to a tax reduction on the basis of payment of health insurance contributions and the right to deduct from the basis of assessment social security contributions which have been paid are refused where those contributions have been paid in another Member State.

44 The second question follows on from the first and seeks a ruling from the Court on the consequences for a national court of a finding that provisions which in other respects have been ruled to be incompatible with the Constitution are incompatible with Community law. The national court seeks to ascertain, in essence, whether, in the event that Article 43 EC precludes provisions such as those at issue in the main proceedings, the primacy of Community law obliges the national courts to apply Community law and not to apply the national provisions at issue, and to do so even before the judgment of 7 November 2007 of the Trybunał Konstytucyjny, in which that court held that those provisions were incompatible with certain provisions of the Polish Constitution, comes into effect.

45 In light of the foregoing, it is not manifestly obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, that the problem is hypothetical, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

46 Accordingly, the questions referred are admissible.

Substance

The first question

47 By its first question, the referring court asks in essence whether Article 43 EC precludes national

legislation under which a taxpayer has the right to have the amount of the social security contributions paid in the tax year deducted from his basis of assessment and, further, the right to have his liability to income tax reduced on the basis of the health insurance contributions paid in that period, only in the case where those contributions have been paid in the Member State of taxation, while such advantages are refused in the case where those contributions have been paid in another Member State.

Observations submitted to the Court

48 The position of the Polish Government in relation to the first question can essentially be inferred from its observations on admissibility which are set out in paragraphs 29 to 33 of this judgment.

49 According to the Commission of the European Communities, the description by the referring court of Mr Filipiak's situation suggests that the applicant in the main proceedings was able personally to perform tasks associated with the partnership's activity and to exercise a degree of control. His situation would therefore at first sight come within the scope of Article 43 EC. However, Article 49 EC might also be relevant to a resolution of the dispute brought before the national court because it cannot be ruled out that Mr Filipiak, while residing in Poland, also provides services in the Netherlands.

50 The Commission takes the view that the provisions at issue in the main proceedings, which deny resident taxpayers entitlement to tax advantages based on compulsory insurance contributions in cases where those contributions have been paid in a Member State other than the Republic of Poland, establish an unjustifiable restriction on both Article 43 EC and Article 49 EC.

Reply of the Court

51 It must be observed that, in its wording of the first question, the referring court confines its request for an interpretation of Article 43 EC solely to the case in which compulsory social security and health insurance contributions paid in a Member State other than the Republic of Poland have not been deducted in that other Member State. An answer will be given to that question therefore on the assumption that the compulsory contributions paid in the Netherlands by a taxpayer such as Mr Filipiak could not be deducted in the Netherlands.

– The applicable provisions of the EC Treaty

52 In accordance with well-established case-law, the concept of 'establishment' within the meaning of Article 43 EC is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25, and Case C-470/04 *N* [2006] ECR I-7409, paragraph 26). Where a Community national lives in one Member State and has a shareholding in the capital of a company established in another Member State which gives him substantial influence over the company's decisions and allows him to determine its activities, that may thus fall within the freedom of establishment (see, to that effect, *N*, paragraph 27; Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraphs 22 and 70; and Case C-360/06 *Heinrich Bauer Verlag* [2008] ECR I-7333, paragraph 27).

53 As the Commission has stated, the situation of a taxpayer such as Mr Filipiak, who is a member of a partnership under Netherlands law, the organisational structure of which corresponds to that of a general partnership under Polish law, suggests that that taxpayer was able personally to perform tasks associated with the economic activity of that partnership and that he had a degree of control over that

activity.

54 The order for reference does not, however, state whether Mr Filipiak's situation comes within the scope of Article 43 EC in accordance with the Court's case-law, in other words whether he has, in the partnership which is based in another Member State, a holding which gives him substantial influence over that partnership's decisions and allows him to determine its activities. In any event, it is for the national court to assess whether this is indeed the case and whether Mr Filipiak's situation comes within the scope of Article 43 EC.

55 Moreover, as the Commission has pointed out, the order for reference does not state whether a taxpayer such as Mr Filipiak, in addition to exercising control over the economic activity of the Netherlands partnership of which he is a member, also provides services in the Netherlands.

56 Consequently, while such a situation may come under Article 43 EC, it may also come under the provisions of the Treaty on freedom to provide services because it cannot be ruled out that Mr Filipiak, while a taxpayer resident in Poland, not only has a degree of control over the economic activity of the Netherlands partnership of which he is a member, but also provides services in the Netherlands.

57 The situation of a taxpayer such as Mr Filipiak may therefore be examined in light of the principle of freedom of establishment laid down in Article 43 EC and of the principle of freedom to provide services provided for in Article 49 EC.

– Whether there is a restriction on the freedoms of movement

58 It is settled case-law that all of the Treaty provisions on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the European Community, and preclude measures which might place them at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, inter alia, Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraph 21, and Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 43).

59 In accordance with well-established case-law, the freedom of establishment which is granted by the Treaty to Community nationals and which includes the right for them to take up and pursue activities as self-employed persons, under the conditions laid down for its own nationals by the law of the Member State, entails, in accordance with Article 48 EC, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to exercise their activity in the Member State concerned through a subsidiary, branch or agency (see Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, paragraph 18, and judgment of 23 April 2009 in Case C-406/07 *Commission* v *Greece*, not published in the ECR, paragraph 36).

60 The Court has also stated on several occasions that, even though, according to their wording, the provisions concerning freedom of establishment are mainly aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 48 EC (see Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 28; Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 42, and *Heinrich Bauer Verlag*, paragraph 26).

61 Furthermore, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (Case C-318/05 *Commission* v *Germany* [2007] ECR I-6957, paragraph 81; Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 52; and Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-0000, paragraph 32).

62 The case in which tax provisions of a Member State which apply to cross-border economic activities are less favourable than those which apply to an economic activity pursued within the borders of that Member State constitutes an example of a restriction which is prohibited by Articles 43 EC and 49 EC.

63 In a case such as that in the main proceedings, Article 26(1)(2) of the Law on income tax allows taxpayers subject to taxation in Poland to reduce their basis of assessment for income tax by the amount of compulsory social security contributions paid pursuant to the Law on social security. Article 27b of the Law on income tax allows taxpayers who are subject to taxation in Poland to reduce the amount of their income tax in line with the amount of compulsory health insurance contributions paid pursuant to the Law on publicly funded health-care benefits.

64 Mr Filipiak, a Polish taxpayer who is pursuing his economic activity as a member of a partnership established in a Member State other than the Republic of Poland, is subject to compulsory social security and health insurance in the Netherlands, and not in Poland. In accordance with Article 13(2)(b) of Regulation No 1408/71, a person who is self-employed in the territory of one Member State is to be subjected to the legislation of that State even if he resides in the territory of another Member State. Under Article 13(1), a person is to be subject to the social security legislation of a single Member State only.

65 The referring court has also stated that the social security and health insurance contributions paid by Mr Filipiak under Netherlands legislation are identical, in both their nature and purpose, to the contributions paid by Polish taxpayers under the Polish legislation relating to the social security system and publicly funded health-care benefits.

66 Legislation such as that at issue in the main proceedings introduces a difference in the treatment of resident taxpayers, namely that the possibility of health insurance contributions being deducted from the amount of income tax payable in Poland or the possibility of social security contributions being deducted from the basis of assessment in Poland depends on whether those contributions have or have not been paid under the compulsory national health insurance or social security schemes.

67 It follows that any taxpayer who is resident in Poland but pursues his economic activity in another Member State in which he is subject to compulsory social insurance and health insurance will not be able to deduct the amount of the contributions which he pays from his basis of assessment or to reduce the tax payable in Poland by the amount of those contributions. He will therefore be less favourably treated than any other taxpayer who is resident in Poland but who restricts his economic activity to within the borders of Poland and pays his compulsory social security and health insurance contributions to the competent Polish public authority.

68 With regard to the taxation of their income in Poland, however, it should be borne in mind that resident taxpayers are not in objectively different situations capable of justifying such a difference in treatment according to the place in which contributions are paid.

69 The situation of a taxpayer such as Mr Filipiak, resident in Poland and pursuing an economic activity

in another Member State, where he is affiliated to compulsory social security and health insurance schemes, and that of a taxpayer who is also resident in Poland but pursues his economic activity within Poland, where he is affiliated to the compulsory national social security and health insurance schemes, are comparable as regards taxation principles since, in Poland, both are subject to unlimited tax liability.

70 Thus, the taxation of their income in that Member State should be carried out in accordance with the same principles and, consequently, on the basis of the same tax advantages.

71 In those circumstances, the refusal to grant to the resident taxpayer the right either to deduct from the basis of assessment in Poland the amount of the compulsory social security contributions paid in another Member State or to reduce the tax payable in Poland by the amount of the compulsory health insurance contributions paid in a Member State other than the Republic of Poland may deter that taxpayer from taking advantage of the freedom of establishment and freedom to provide services under Articles 43 EC and 49 EC, and amounts to a restriction on those freedoms (see, to that effect, in relation to Article 18 EC, *Rüffler*, paragraphs 72 and 73).

72 It follows from settled case-law of the Court that provisions of national law which may discourage or deter the exercise of fundamental freedoms guaranteed by Articles 43 EC and 49 EC may, none the less, be justified by overriding reasons in the public interest.

73 No possible justification has, however, been put forward by the Polish Government or been suggested by the referring court.

74 In light of the foregoing, the answer to the first question is that Articles 43 EC and 49 EC preclude national legislation under which the possibility for a resident taxpayer to obtain, first, a deduction from the basis of assessment in the amount of social security contributions paid in the tax year and, second, a reduction of the income tax which he is liable to pay by the amount of health insurance contributions paid in that period, exists solely when those contributions are paid in the Member State of taxation, while such advantages are refused in the case where those contributions are paid in another Member State, even though those contributions were not deducted in that other Member State.

The second question

75 By this question, the referring court asks, in essence, whether, in the event that the answer to the first question is that Article 43 EC and/or Article 49 EC preclude provisions of national law such as those at issue in the main proceedings, in those circumstances the primacy of Community law obliges the national court to apply Community law in the proceedings before it and not to apply the provisions of national law at issue, regardless of the judgment of the national constitutional court deciding to defer the loss of binding force of those provisions which it has held to be unconstitutional.

Observations submitted to the Court

76 The position of the Polish Government in relation to the second question can essentially be inferred from its observations on admissibility which are set out in paragraphs 36 to 39 of this judgment.

77 The Commission contends that the second question is designed to ascertain whether the principle of the primacy of Community law and Articles 10 EC and 43 EC preclude the application of provisions of national law which allow the Trybunał Konstytucyjny to defer, in one of its judgments, the date on which a national law or regulation which has been held in that judgment to be unconstitutional will lose

its validity.

78 The Commission considers that there is no link between the second question and the resolution of the dispute in the main proceedings. In the case of Mr Filipiak, the deferral by the Trybunał Konstytucyjny of the date on which the provisions at issue will lose their validity does not prevent the referring court from respecting the principle of the primacy of Community law and thus declining to apply those provisions.

79 The Commission concludes that the possibility, under Article 190(3) of the Polish Constitution, of deferring the date on which the provisions at issue will lose their validity, a possibility of which the Trybunał Konstytucyjny made use in its judgment of 7 November 2007, does not infringe either the principle of the primacy of Community law or Articles 10 EC and 43 EC, because it is not contrary to the obligation, imposed on national authorities and national courts, not to apply provisions of national law which are contrary to Article 43 EC.

80 The Commission accordingly takes the view that the principle of the primacy of Community law and Articles 10 EC and 43 EC must be interpreted as not precluding the application of provisions of national law which allow the Trybunał Konstytucyjny to defer, in a judgment, the date on which provisions of national law which have been held, in that judgment, to be unconstitutional will lose their binding force.

Reply of the Court

81 In accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 32; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 61; and Case C-115/08 *ČEZ* [2009] ECR I-0000, paragraph 138).

82 Pursuant to the principle of the primacy of Community law, a conflict between a provision of national law and a directly applicable provision of the Treaty is to be resolved by a national court applying Community law, if necessary by refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, the powers of authorities, courts and tribunals in that regard being a matter to be determined by each Member State.

83 In that context, it must be recalled that the Court has already held that the incompatibility with Community law of a subsequently adopted rule of national law does not have the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law (Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90 and Others* [1998] ECR I-6307, paragraph 21).

84 It follows that, in a situation such as that of the applicant in the main proceedings, the deferral by the Trybunał Konstytucyjny of the date on which the provisions at issue will lose their binding force does not prevent the referring court from respecting the principle of the primacy of Community law and

from declining to apply those provisions in the proceedings before it, if the court holds those provisions to be contrary to Community law.

85 Since, as stated in paragraph 74 of this judgment, the answer to the first question is that Articles 43 EC and 49 EC preclude national provisions such as those at issue in the main proceedings, the answer to the second question is that, in those circumstances, the primacy of Community law obliges the national court to apply Community law and to refuse to apply the conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.

Costs

86 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:

1. **Articles 43 EC and 49 EC preclude national legislation under which the possibility for a resident taxpayer to obtain, first, a deduction from the basis of assessment in the amount of social security contributions paid in the tax year and, second, a reduction of the income tax which he is liable to pay by the amount of health insurance contributions paid in that period, exists solely when those contributions are paid in the Member State of taxation, while such advantages are refused in the case where those contributions are paid in another Member State, even though those contributions were not deducted in that other Member State.**

2. **In those circumstances, the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.**

[Signatures]

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* Language of the case: Polish.