

**Judgment of the Court of 15 February 2000**

**Commission of the European Communities v French Republic**

**Social security - Financing - Legislation applicable**

**Case C-34/98**

*European Court reports 2000 Page I-00995*

In Case C-34/98,

Commission of the European Communities, represented by P. Hillenkamp, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorates in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and C. Chavance, Secretary for Foreign Affairs in the same Directorate, acting as Agents,

defendant,

APPLICATION for a declaration that, by applying the social debt repayment contribution to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who, by virtue of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) and Article 13 of the said regulation,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, L. Sevón, R. Schintgen (Presidents of Chambers), C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 7 September 1999,

gives the following

Judgment

## Grounds

**1** By application lodged at the Court Registry on 12 February 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by applying the social debt repayment contribution (contribution pour le remboursement de la dette sociale, hereinafter the CRDS) to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who, by virtue of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, hereinafter Regulation No 1408/71), are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) and Article 13 of the said regulation.

### The Community rules

**2** Article 4(1) and (2) of Regulation No 1408/71 provides:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

- (b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
- (c) old-age benefits;
- (d) survivor's benefits;
- (e) benefits in respect of accidents at work and occupational diseases;
- (f) death grants;
- (g) unemployment benefits;
- (h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

**3** Article 1(j) of Regulation No 1408/71 defines the term legislation as meaning in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a).

**4** Article 13 of the Regulation provides:

1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

....

#### **The national rules**

**5** The CRDS was introduced by Article 14-I of Order No 96-50 of 24 January 1996 on the repayment of the social debt (Journal Officiel de la République Française, 25 January 1996, p. 1226, hereinafter the Order).

**6** All natural persons domiciled in France for income tax assessment purposes are liable to pay the CRDS, in particular on their employment income or substitute income.

**7** For the purposes of Article 4B of the General Tax Code, persons whose home or principal place of residence is in France, persons who are employed or self-employed in France, unless they prove that that employment is on an ancillary basis, and persons for whom France is the centre of their economic activities are deemed to be domiciled in France for tax purposes.

**8** The assessment basis for the CRDS, the rate of which is 0.5%, includes, in particular, as regards employment income or substitute income, wages, retirement and invalidity pensions, unemployment allowances, professional fees and statutory family benefits.

**9** Under Article 15-III(1) of the Order, and subject to international conventions on the avoidance of double taxation, employment income or substitute income from a foreign source which is subject to income tax in France is also subject to the CRDS. Returns relating to such income must be made to the competent tax office so that it may establish and collect the appropriate contribution.

**10** Under Article 6-I of the Order, the proceeds of the CRDS go to the Caisse d'Amortissement de la Dette Sociale (Social Debt Redemption Fund, the CADES) which is a public body set up by the same Order and placed under the joint supervision of the Minister for the Economy and Finance and the Minister for Social Security. The primary purpose of the CADES is to discharge the debt of FRF 137 000 million contracted by the Agence Centrale des Organismes de Sécurité Sociale (Central Agency for Social Security Institutions, ACOSS) to the Caisse des Dépôts et Consignations (Consignments and Loans Fund, the CDC) which was transferred to the CADES with effect from 1 January 1996. That debt corresponds to the financing by the CDC of the deficits accumulated in 1994 and 1995 by the general social security scheme and to the scheme's estimated deficit for 1996. The CADES also had to make a payment for 1996 alone of FRF 3 000 million to the Caisse Nationale d'Assurance Maladie et Maternité des Travailleurs Non Salariés des Professions Non Agricoles (National Sickness and Maternity Fund for Self-Employed Workers in Non-Agricultural Occupations).

**11** Furthermore, pursuant to Article 4-III of the Order, the CADES must make payments of FRF 12 500 million for each year from 1996 to 2008 to the general State budget. It appears from the Report to the President of the Republic on the Order that those payments are to compensate for payments of an equivalent amount which were previously payable by the Fonds de Solidarité Vieillesse (Old-Age Solidarity Fund) in order to discharge a prior ACOSS debt.

**12** The funds to enable the CADES to fulfil its task come from the proceeds of the CRDS, which is levied not only on employment income or substitute income but also on other categories of income, such as assets or the sale of certain precious metals, and from other proceeds, such as those arising from the management and sale of the housing stock of social security institutions and the issue of bonds.

### **Pre-litigation procedure**

**13** By letter of formal notice of 6 December 1996, the Commission requested the French Government to submit its observations on the compatibility with Community law of applying the CRDS to the employment income or substitute income of employed and self-employed persons resident in France but working in another Member State, who are not, by virtue of Regulation No 1408/71, subject to French social security legislation.

**14** According to the Commission, the levy in question undermines the rule that the legislation of a single Member State is to apply because the CRDS is charged on income from which all social security contributions have already been deducted in the State of employment, which is the only Member State competent in social security matters in accordance with Article 13 of Regulation No 1408/71. In addition, the CRDS levied on such incomes constitutes discrimination incompatible with the freedoms guaranteed under Articles 48 and 52 of the Treaty.

**15** By letter of 3 March 1997, the French authorities replied that the Commission's position failed to take account of the characteristics and purpose of the CRDS. In particular, persons liable to pay the CRDS did not receive any social security benefits in return. According to the French authorities, the CRDS should be categorised, in the light of the Court's case-law, as a tax.

**16** In its reasoned opinion of 23 July 1997, the Commission stood by its argument and added that its request related only to the employment income and substitute income of employed or self-employed persons working in another Member State. It therefore asked the French Republic to comply with the reasoned opinion within two months of its notification.

**17** By letter of 21 October 1997, the French authorities repeated their assertion that since the CRDS was in the nature of a fiscal charge, it did not fall within the scope of Regulation No 1408/71 and, in so far as it was also payable by frontier workers, it did not disregard the principle of freedom of movement for workers.

**18** Since the French authorities failed to comply with the reasoned opinion within the period allowed, the Commission decided to bring the present action.

### **The action**

**19** This action concerns the levying of the CRDS only in so far as it relates to the employment income and substitute income obtained by employed and self-employed persons resident in France and taxable in that Member State in connection with employment in another Member State. Such persons are therefore covered by the social security scheme of the State of employment in accordance with Regulation No 1408/71.

**20** According to the Commission, that charge is a double social levy contrary both to Article 13 of Regulation No 1408/71 and to Articles 48 and 52 of the Treaty.

### **Infringement of Article 13 of Regulation No 1408/71**

**21** The Commission submits that the CRDS, which is intended to contribute to the financing of all branches of the general French social security scheme, and therefore covers the various branches of social security listed in Article 4(1) of Regulation No 1408/71, is a social security contribution which falls within the scope of that regulation.

**22** It maintains that the three features of the CRDS, namely that it is in part intended to pay off the social debt caused by the financing of benefits paid out in past years, that its collection is effected, as regards the workers concerned by the present action, by way of an assessment roll, as with income tax, and not directly by the institutions responsible for collecting contributions for the general social security scheme, and that the amounts collected pass through the CADES, do not remove the levy in question from the scope of Regulation No 1408/71.

**23** Consequently, by levying the CRDS on the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State, the French Republic is disregarding the rule set out in Article 13 of Regulation No 1408/71 that the legislation of a single State is to apply, in so far as that same income has already borne all the social charges imposed in the Member State of employment, whose legislation is the sole legislation applicable by virtue of Article 13.

**24** The French Government contends that the right to social protection is one of the citizen's fundamental rights. Such protection must at the same time cover the entire population and be at a high level, whilst its cost must be shared equitably between citizens.

**25** It considers that the latter objective should not be attained by financing founded on social security contributions based on employment income alone but must involve all taxpayers' income. The CRDS, together with the general social contribution which is the subject of another judgment delivered today (Case C-169/98 *Commission v France*), constitutes measures adopted in the context of the move towards funding social security by taxation.

**26** By reason of its characteristics and purpose, the CRDS should be categorised as a tax, thereby falling outside the scope of Regulation No 1408/71 and remaining within the ambit of the Member States' own responsibilities in budgetary and social policy matters.

**27** In support of its argument, the French Government points out in particular that the CRDS is payable on the basis of the single criterion of domicile for tax purposes in France, whatever the occupational status of the person concerned or social security system to which he belongs. Moreover, persons subject to the CRDS do not receive any social security benefit in return for the levy, so that there is no link between the payment of the CRDS, on the one hand, and identifiable benefits which French residents have received in the past or which they may receive in the future, on the other. As regards the CADES, to which the sums collected by way of the CRDS are

paid, this is a body of a financial character rather than a social security body, whose task it is to discharge the debt of a public institution, the ACOSS, which is not involved in any way in the administration of benefits or the collection of contributions and does not finance any social benefit.

**28** The French Government points out that Regulation No 1408/71 does not contain any definition of the term social contributions and leaves the Member States free to choose the various methods of organisation and funding for their social security systems.

**29** If, as the Commission states, the system of social security funding in Denmark, which is based mainly on tax, is compatible with Community law, the same should apply in respect of the CRDS. This is a measure of indirect budgetary taxation, since it funds the CADES which, in turn, helps to finance the State budget. It would of course have been possible to fund the CADES by means of an annual budgetary allowance, financed by an increase in income tax or value added tax which would have to be paid *inter alia* by frontier workers resident in France. The French Republic did not choose such a system, which would lack visibility as far as taxpayers were concerned and would therefore be likely to a large extent to frustrate the objective pursued.

**30** Lastly, the French Government contends that the CRDS does not constitute a measure the purpose of which is to compensate for the fact that frontier workers do not belong to and therefore do not contribute to the French social security scheme, pursuant to Regulation No 1408/71. The rate of the CRDS is 0.5%, whilst the total of the sums levied relating to social contributions amounts to 42% of the pay of those liable.

**31** As the Court has held, however, the fact that a worker is required to pay, in respect of the same earned income, social charges arising under the legislation of several States, although he can be an insured person only in respect of the legislation of one State, means that the worker must pay contributions twice over, contrary to the provisions of Article 13 of Regulation No 1408/71 (see in particular Case 102/76 *Perenboom* [1977] ECR 815, paragraph 13, and Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 26).

**32** It is common ground that the persons concerned by this infringement action, namely Community nationals resident in France but working in another Member State who, pursuant to the provisions of Article 13 of Regulation No 1408/71, are insured persons under the legislation of the State of employment alone, are being required, subject, where applicable, to conventions on the avoidance of double taxation concluded by the French Republic, to pay, in respect of income relating to their work in the Member State of employment, not only the social charges arising from the application of the latter's social security legislation, but also the social charges, in this case the CRDS, arising from the application of the legislation of the Member State of residence.

**33** The argument of the French Government to the effect that since the CRDS is really to be categorised as a tax it falls outside the scope of Regulation No 1408/71 and accordingly is not caught by the prohibition against overlapping legislation cannot be accepted.

**34** The fact that a levy is categorised as a tax under national legislation does not mean that, as regards Regulation No 1408/71, that same levy cannot be regarded as falling within the scope of that regulation and caught by the prohibition against overlapping legislation.

**35** As the Court has held, in particular in Case C-327/92 *Rheinhold & Mahla* [1995] ECR I-1223, paragraph 15, Article 4 determines the matters covered by Regulation No 1408/71 in terms which make it clear that the national social security schemes are subject in their entirety to the application of the rules of Community law. At paragraph 23 of that judgment the Court stated that the decisive factor for the purposes of applying Regulation No 1408/71 is that there must be a link between the provision in question and the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71, and that that link must be direct and sufficiently relevant.

**36** As the Commission rightly maintains, there is such a direct and sufficiently relevant link between the CRDS and the general French social security scheme so that it can be regarded as a levy covered by the prohibition against double contributions.

**37** As the Advocate General noted at points 25 and 27 of his Opinion, in contrast to levies designed to meet general public charges, the purpose of the CRDS is specifically and directly to discharge the deficit of the general French social security scheme, and it forms part of a comprehensive reform of social protection in France aimed at ensuring the future financial equilibrium of that system, the branches of which are indisputably among those covered by Article 4(1) of Regulation No 1408/71.

**38** That link cannot be broken by the choice of the specific detailed allocation of the sums in question for the purposes of financing the French social security scheme, unless the prohibition against overlapping legislation is to be deprived of all effectiveness. Consequently, neither the fact that the proceeds of the CRDS are paid to the CADES rather than to the social security institutions directly, nor the fact that collection of the CRDS is effected as regards workers concerned by this action by way of an assessment roll, in the same way as income tax, rather than directly by the institutions responsible for collecting contributions to the general social security scheme, is capable of affecting the conclusion, which is decisive, that the CRDS is allocated specifically and directly to the financing of the French social security scheme and therefore falls within the scope of Regulation No 1408/71.

**39** Similarly, neither the fact that payment of the CRDS does not give entitlement to any direct and identifiable benefit in return nor the fact that it is in part designed to discharge a debt of the social security scheme caused by the financing of benefits paid out in the past can undermine that conclusion.

**40** First, for the purposes of the application of Article 13 of Regulation No 1408/71, the decisive criterion is that of the specific allocation of a contribution to the funding of the social security scheme of a Member State. Whether benefits are obtained or not in return is therefore irrelevant in this connection.

**41** Secondly, to accept the argument that because the CRDS serves to finance the deficits of past years it falls outside the scope of Regulation No 1408/71 would have the effect of enabling Member States to circumvent the

prohibition on double contributions by merely shifting the period in respect of which deficits of its social security scheme are funded. The effectiveness of that prohibition would, in such circumstances, be effectively destroyed.

**42** In the light of those considerations, the first of the Commission's objections is well founded.

### **Infringement of Articles 48 and 52 of the Treaty**

**43** According to the Commission, taxpayers resident in France and covered by the French social security scheme are in a situation that is different from that of taxpayers who are resident in that Member State but, having exercised their rights to free movement and freedom of establishment laid down in Articles 48 and 52 of the Treaty respectively, are required to contribute to the funding of the social security scheme of another Member State pursuant to Regulation No 1408/71. By failing to take that difference into account, the French Republic is in breach of the principle of equal treatment laid down in those provisions.

**44** For the French Government, in contrast, workers in receipt of employment income or substitute income in another Member State are, as regards the CRDS, in a situation comparable to that of workers receiving such income in France, so that no discrimination has been introduced with regard to the former. First of all, the rate of and assessment basis for the CRDS are identical for all residents in France, whatever their nationality, who are subject to tax on their income from a foreign source. According to the French Government, the CRDS is thus an integral part of a tax system that is wholly consistent with regard to residents taxable in France. Secondly, the CRDS falls within the scope of the bilateral conventions on the avoidance of double taxation concluded by the French Republic which give entitlement to tax credits or exemption for income from a foreign source in order to eliminate any double taxation. Lastly, the French Government points to the low rate of the levy in question.

**45** Even if the CRDS is applicable in the same way to all residents in France, however, those who work in another Member State and who, in accordance with Article 13 of Regulation No 1408/71, contribute to the funding of the social security scheme of that State are being required in addition to finance, even if only partially, the social security scheme of the State of residence, whereas all other residents are exclusively required to contribute to the latter State's scheme.

**46** The rule laid down in Article 13 of Regulation No 1408/71 that the legislation of a single Member State is to apply in matters of social security is aimed specifically at eliminating unequal treatment which is the consequence of partial or total overlapping of the legislation.

**47** As is clear from the tenth recital in the preamble to Regulation No 1408/71, the principle that the legislation of a single Member State is to apply is aimed at guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible.

**48** It follows from the foregoing that, as the Advocate General noted in point 35 of his Opinion, in putting forward this objection the Commission is only focusing, in the light of Articles 48 and 52, on the same infringement as that found in the context of Article 13 of Regulation No 1408/71. Since the CRDS scheme is at the origin of the unequal treatment contrary to that article, it disregards to the same degree the provisions of the Treaty that Article 13 is designed to implement. The unequal treatment thus found constitutes an obstacle to the free movement of workers for which, in view of Article 13 of Regulation No 1408/71, there can be no justification.

**49** As regards the argument of the French Government to the effect that in any event the CRDS only affects a limited number of the workers concerned by this action on account of bilateral conventions on the avoidance of double taxation concluded by the French Republic, and that the rate of the contested levy is minimal, it need merely be observed that, according to the case-law of the Court, the articles of the Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited (see in particular Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 8).

**50** The Commission's second objection is therefore also well founded.

**51** It follows from all the above considerations that, by applying the CRDS to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who, by virtue of Regulation No 1408/71, are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Article 13 of that regulation and under Articles 48 and 52 of the Treaty.

## **Decision on costs**

### **Costs**

**52** Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the French Republic be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

## Operative part

On those grounds,

THE COURT

hereby:

1. Declares that, by applying the social debt repayment contribution to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who, by virtue of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Article 13 of that regulation and under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC);
2. Orders the French Republic to pay the costs.