OPINION OF ADVOCATE GENERAL JACOBS

delivered on 17 November 2005 [1]

1. In the present case, the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) has asked whether Community law precludes the Netherlands from levying national insurance contributions on income in the form of interest paid by a company established in the Netherlands to a Netherlands national resident in Belgium to whom both Netherlands and Belgian social security legislation is applicable under Regulation No 1408/71. [2]

2. That question has arisen in proceedings between Mr Piatkowski and the inspector of the competent tax authority ('the Inspector').

Relevant Community legislation

3. Title II of Regulation No 1408/71 contains a set of choice of law rules designed to determine the social security legislation applicable to the persons falling within the scope of that regulation. Those rules are based on the principle that an employed or self-employed person is subject to the legislation of only one Member State at a time ('the single State principle'). Thus, Article 13(1) of Regulation No 1408/71 lays down the following general rule:

'Subject to Articles 14c and 14f, 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.'

4. The single State principle applies to persons who are employed in more than

1 — Original language: English.

2 — 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 (OJ, English Special Edition 1971 (II), p. 416). The text of the regulation as amended may be found in Part I of Annex A to Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation No 1408/71 (OJ 1997 L 28, p. 1). The provisions at issue in the present case were further amended (although the amendment is not material) by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) with effect from 25 July 1998.

one Member State; [3] to persons who are self-employed in more than one Member State; [4] and (as a general rule) to persons who are employed in one Member State and self-employed in another Member State. [5]

5. As may be seen from the wording of Article 13(1), Title II contains only two exceptions to that principle.

6. Article 14f concerns civil servants who are simultaneously employed in two or more Member States; it is not in issue in the present case.

7. Article 14c(a) lays down the general rule that a person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State is to be subject to the legislation of the State of employment.

3 — Article 14(2) of Regulation No 1408/71.

4 — Article 14a(2) of Regulation No 1408/71.

5 — Article 14c(1)(a) of Regulation No 1408/71.

8. Article 14c(b) qualifies that rule in certain cases. According to Article 14c:

'A person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

...

(b) in the cases mentioned in Annex VII:

— to the legislation of the Member State in the territory of which he is engaged in paid employment ..., and

— to the legislation of the Member State in the territory of which he is self-employed ... .'

9. Annex VII to Regulation No 1408/71 mentions in the list of cases in which a person is to be simultaneously subject to the legislation of two Member States:

'1. Where he is self-employed in Belgium and gainfully employed in any other Member State'.

Relevant national legislation

10. At the relevant time, Netherlands social security legislation provided that a non-resident subject to tax on income from employment in the Netherlands was compulsorily insured under the Netherlands' four general social security schemes. [6]

11. Such a person was also liable to pay contributions in respect of national insurance. [7]

12. In the case of a non-resident, the level of contributions was set by reference to the insured person's taxable domestic income within the meaning of the Wet op de inkomstenbelasting (Law on income tax) 1964. [8]

13. Taxable domestic income was defined as gross domestic income, [9] in turn defined as all income including (i) income from employment and (ii) net income arising out of debts due from a company established in the Netherlands where the recipient had a significant interest in that company as defined and that interest did not belong to the assets of an undertaking. [10]

14. In comparison, in the case of a resident, the level of national insurance contributions was set by reference to the insured person's worldwide income within the meaning of the Wet op de inkomstenbelasting.

6 — Article 6(1)(b) of the Algemene Ouderdomswet (General law on old-age insurance) and the corresponding provisions of the Algemene nabestaandenwet (General law on survivors), the Algemene Kinderbijslagwet (General law on family benefits) and the Algemene Wet Bijzondere Ziektekosten (General law on sickness insurance).

7 — Article 6 of the Wet financiering volksverzekeringen (Law relating to the financing of national insurance).

8 — Articles 7 and 8 of the Wet financiering volksverzekeringen.

9 — Article 48(3) of the Wet op de inkomstenbelasting.

10 — Article 49(1)(c)(1) and (4) of the Wet op de inkomstenbelasting.

The main proceedings and the question referred

15. The referring court explains the background to the main proceedings as follows.

16. Mr Piatkowski, who has Netherlands nationality, lived in the Netherlands until 1996, when he moved to Belgium. He was resident in Belgium throughout 1998, during which year he worked in both the Netherlands and Belgium.

17. In the Netherlands he worked as a director of Vanderheide Beheer BV ('Vanderheide'), a company established in the Netherlands. Vanderheide is a wholly owned subsidiary of Marlon NV, a company established in Belgium, the shares in which are all held by Mr Piatkowski and his spouse. Mr Piatkowski's salary from Vanderheide is taxable in the Netherlands as income from employment; accordingly he was compulsorily insured for the purposes of Netherlands national insurance legislation and hence liable to contributions.

18. In Belgium Mr Piatkowski worked as the manager of one or more companies established in Belgium. For the purposes of Belgian social security legislation those activities are deemed to have been carried on otherwise than as a salaried employee.

19. Mr Piatkowski had a claim against DuvedeC BV, a company established in the Netherlands, 41% of whose share capital was held by Vanderheide. In 1998 Mr Piatkowski received an interest payment in respect of that claim. Since that interest payment met the conditions laid down by Article 49(1)(c)(4) of the Wet op de inkomstenbelasting, [11] under Netherlands law it formed part of Mr Piatkowski's taxable domestic income.

20. The Inspector accordingly included the interest payment in the basis of assessment for the purposes of calculating the national insurance contributions due from Mr Piatkowski in the Netherlands for 1998.

21. The interest payment was not included in Belgium in the calculation of Mr Piatkowski's national insurance contributions for that year. [12]

22. Mr Piatkowski takes the view that in accordance with Regulation No 1408/71 competence to levy national insurance contributions on the interest payment lies with Belgium by virtue of his residence.

11 — See point 13 above.

12 — According to the Commission, interest on a debt is treated in Belgium as income from personal property and is not relevant for the calculation of social security contributions, which are based solely on earned income.

23. The referring court entertains doubts as to the correct interpretation of Article 14c(b) of Regulation No 1408/71. It has accordingly stayed the proceedings and referred the following question to the Court:

'Does Community law, in particular the right to freedom of movement and Article 14c(b) of Regulation No 1408/71 (version applicable in 1998), preclude the Netherlands from levying national insurance contributions on interest income paid by a company established in the Netherlands to a Belgian resident to whom under Article 14c(b), in conjunction with point 1 of Annex VII to Regulation No 1408/71, both Netherlands and Belgian social security legislation are applicable?'

24. Written observations have been lodged by the Netherlands Government and the Commission. No hearing has been requested and none has been held.

Assessment

25. Both the Netherlands Government and the Commission submit that the question referred should be answered in the negative. I agree.

Applicable legislation

26. Prima facie, the facts fall squarely within the scope of Article 14c(b): Mr Piatkowski 'is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State', as required by Article 14c generally, and in particular 'is self-employed in Belgium and gainfully employed in [another] Member State' within the meaning of Annex VII, as required by Article 14c(b).

27. In that case, Article 14c(b) provides that he is to be subject to the legislation of both Member States concerned, in derogation from the general rule laid down by Article 13(1) of Regulation No 1408/71 that persons to whom the regulation applies are to be subject to the legislation of a single Member State only.

28. The present case may be contrasted with the previous cases in which the Court has been asked to interpret Article 14c(b). [13] Those cases each concerned the question whether an insured person in a similar

13 — Case C-340/94 *De Jaeck* [1997] ECR I-461; Case C-221/95 *Hervein and Hervillier* [1997] ECR I-609 *('Hervein I')*; Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829 *('Hervein II')*.

context to Mr Piatkowski could lawfully be required by virtue of that provision to contribute to two separate social security schemes. It was argued in *De Jaeck* and *Hervein I* that company directors were in fact self-employed, even though the Member State concerned [14] categorised them as employed; by virtue of Article 14a(2) of Regulation No 1408/71, [15] the applicant in each case was accordingly subject to the social security legislation of the Member State of residence alone. The Court ruled in each case that for the purposes of Articles 14a and 14c '"employed" and "self-employed" should be understood to refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in whose territory those activities are pursued'. In *Hervein II*, the applicants argued that Article 14c(b) (then Article 14c(1)(b)) [16] and Annex VII were contrary to Articles 39 and 43 EC inasmuch as they provided that persons employed in one Member State and self-employed in another Member State were subject to the legislation of both those Member States. The Court did not accept that argument.

29. In the present case, Mr Piatkowski does not contest the fact that he is subject to two different social security schemes but takes issue with the fact that the Netherlands, rather than Belgium, seeks to include the interest payment in the basis of assessment. Mr Piatkowski considers that that is contrary to Community law.

30. The referring court notes that, as originally worded, Article 14c(b) [17] provided for the simultaneous application of the legislation of each of the Member States concerned 'as regards the activity pursued in its territory'; on that wording, each of the Member States concerned could collect insurance contributions only on income earned on its territory. [18] The referring court accepts that the current version of Article 14c(b) contains no equivalent, but notes that the recitals to Regulation No 3811/86, [19] which introduced that version with effect from 1 January 1987, provide no indication that any substantive change was intended. If the current version of Article 14c(b) should be applied on the same basis as its predecessor, in the present case it would have to be decided whether the interest payment was income arising in Belgium or in the Netherlands.

14 — In *De Jaeck*, the Netherlands and in *Hervein I*, France.

15 — Which provides essentially that a person self-employed in two or more Member States, in one of which he is resident, is to be subject to the legislation of that Member State.

16 — Inserted by Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 (OJ 1981 L 143, p. 1).

17 — See footnote 16.

18 — *De Jaeck*, cited in footnote 13, paragraph 40.

19 — Council Regulation (EEC) No 3811/86 of 11 December 1986 amending Regulation No 1408/71 (OJ 1986 L 355, p. 5).

31. As the Netherlands Government points out in the present case, however, the phrase 'as regards the activity pursued in its territory' became redundant when the wording of the provision was changed. In its original version, Article 14c(1)(b) read as follows:

'A person who is employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

...

(b) in the instances referred to in Annex VII, to the legislation of each of these Member States, as regards the activity pursued in its territory.'

32. It is now however implicit in the revised version that, in the cases mentioned in Annex VII, the insured person is to be subject to the legislation of the Member State where he is employed as regards that employment and to the legislation of the Member State where he is self-employed as regards that self-employment.

33. I accordingly remain of the view which I expressed in my Opinion in *Hervein II*, that the fact that the phrase 'as regards the activity pursued in its territory' was removed from the wording of Article 14c(1)(b) when that provision was amended by Regulation No 3811/86 does not affect its substantive meaning. [20] All that means, however, as I also stated in *Hervein II*, is that persons falling within Article 14c(b) cannot be required to contribute *in respect of the same income* in more than one Member State. [21] That is a basic tenet underlying Regulation No 1408/71. [22] There is no suggestion in the present case of such double contribution: indeed, the referring court expressly states that the interest payments are not taken into account in calculating the level of contributions in Belgium.

Inclusion of the interest payment in the basis of assessment

34. What is at issue in the present case is rather that the level of Mr Piatkowski's contribution in the Netherlands is raised by the inclusion in the basis of assessment of the interest payment. Mr Piatkowski appears to be of the view that competence to levy

20 — Cited in footnote 13, point 60.

21 — Point 60; emphasis added.

22 — See Case C-68/99 *Commission* v *Germany* [2001] ECR I-1865, paragraph 25.

national insurance contributions on that payment lies with Belgium and that it should not therefore be taken into account in the basis of his assessment to social security contributions in the Netherlands. The referring court states that it 'failed to discern in the Regulation any clear connecting factors militating in favour of attributing such income exclusively to one of the Member States concerned'.

35. The sole purpose of the rules in Title II of Regulation No 1408/71 is to determine the legislation applicable to persons within the scope of the regulation. As such, they are not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme. It is for the legislation of each Member State to lay down those conditions. [23] Once therefore it has been determined, by application of the relevant rules of Title II, that the legislation of a given Member State is applicable, it is for that Member State to define the income to be taken into account when assessing the contributions to be made to its social security scheme.

36. The Court has accepted the argument that, where the legislation of a given Member State is applicable by virtue of Regulation No 1408/71, the national authorities may freely determine the detailed rules for financing the social security scheme of that State [24] and has moreover stated in the broader context of the Treaty provisions on the freedom of movement of workers that, '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'. [25]

37. The Court has also ruled that, in the cases referred to in Annex VII, a person who is employed in one Member State and self-employed in another Member State is subject simultaneously to the legislation of each of those States and 'is therefore required to pay such contributions as may be required of him by the legislation of each State'. [26] Regulation No 1408/71 'leaves the Member States competent to determine their own social security schemes and, in particular, to set the level of contributions required'. [27] It is inherent in the system of coordination put in place by Regulation No 1408/71 and concerning, in Title II, the determination of the legislation applicable to employed and self-employed workers who make use, under various circumstances, of their right to freedom of movement, that the

23 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 19.

24 — Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraphs 33 to 35.

25 — *Terhoeve*, cited in footnote 24, paragraph 51.

26 — *De Jaeck*, cited in footnote 13, paragraph 39.

27 — *Commission* v *Germany*, cited in footnote 22, paragraph 29.

level of contributions to be paid in respect of the pursuit of the same activity will differ according to the Member State where that activity is wholly or partly pursued or according to the social security legislation to which that activity is subject. [28]

38. I accordingly agree with the Commission that the inclusion of the interest in question in the basis of assessment is thus simply the consequence of the fact that, by virtue of Article 14c, Netherlands legislation applies in its entirety to Mr Piatkowski, with all the advantages and disadvantages that that involves.

Restrictions on national competence in social security matters

39. Case-law has imposed some restrictions on the exercise by the Member States of the powers which they retain in the area of social security: they must for example ensure that their national social security provisions do not constitute an obstacle to the effective exercise of the freedoms guaranteed by the Treaty and in particular that a migrant worker, who has exercised his right to freedom of movement, is not placed at a disadvantage in relation to a non-migrant worker. [29]

40. In the present case however it does not appear that Mr Piatkowski, having exercised his right to freedom of movement by changing his residence from the Netherlands to Belgium, has been placed at a disadvantage thereby with regard to the treatment of the interest payment for social security purposes in comparison to a non-migrant worker. It appears to be common ground that the interest payment would have been treated in the same way in the Netherlands had Mr Piatkowski not moved to Belgium but remained resident in the Netherlands, in that it would have been included in the basis of his assessment (although ultimately that question is of course a matter for the national court).

41. The referring court also cites the case-law holding that a Member State's social security legislation will be contrary to Articles 39 and 43 EC if the contributions

28 — *Hervein II*, cited in footnote 13, paragraph 52.

29 — See the Opinion of Advocate General Ruiz-Jarabo in *Commission* v *Germany*, cited in footnote 22, point 27 and the cases there cited.

an insured person is required to pay do not afford him any additional social security cover. [30] In the present case, the referring court states that contributions payable by Mr Piatkowski on the interest payment would be offset by no equivalent counterpart in terms of social protection, although it doubts whether that restricts freedom of movement since it could be said of any increase in national insurance contributions that there is no counterpart to that increase in terms of social protection.

42. I agree that the mere fact that the level of an insured person's contributions is increased because the Member State concerned takes account of income from a particular source cannot in itself be regarded as an obstacle to that person's freedom of movement. As both the Netherlands Government and the Commission submit, although the contribution levied on the interest payment gives rise to no specific supplementary social protection since Mr Piatkowski is already covered, what is relevant is whether the fact that a person is subject to the obligation to contribute is balanced by social protection. The scope of protection and the precise mode of calculation of the contribution are not relevant. The case-law mentioned above [31] concerned situations where the fact of contributing to the social security scheme of a given Member State did not entitle the workers concerned to any social security benefits [32] or to any additional social protection [33] or additional social security cover. [34] The present case appears to me to be distinguishable: by contributing to the Netherlands scheme, Mr Piatkowski derives entitlement to cover for old-age and survivor's pensions, family benefits and special medical expenses cover.

43. Finally, the referring court questions whether it would be compatible with the freedom of movement of workers if both the Netherlands and Belgium were to levy national insurance contributions on the interest payment. Since however it is clear from the facts that that situation does not arise in the present case, I do not consider that it is appropriate for the Court to rule on the issue.

30 — *Hervein II*, cited in footnote 13, paragraph 64 and the cases there cited.

31 — See footnote 30.

32 — Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 7.

33 — Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 13.

34 — *Hervein II*, cited in footnote 13, paragraph 64.

Conclusion

44. I accordingly consider that the question referred by the Gerechtshof te 's-Hertogenbosch should be answered as follows:

Neither Articles 39 and 43 EC nor Article 14c(b) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community preclude a Member State from levying national insurance contributions on income in the form of interest paid by a company established in that Member State to a resident of another Member State to whom under Article 14c(b), in conjunction with Annex VII to Regulation No 1408/71, the social security legislation of both those Member States is applicable.